(26,150)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 683.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY AND E. H. RATCLIFF AND L. T. KENNEDY, ITS SURETIES, PLAINTIFFS IN ERROR,

vs.

MRS. CLARA J. MULLINS, ADMINISTRATRIX OF THE ESTATE OF JAMES DAVIS MULLINS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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a THE STATE OF MISSISSIPPI,
County of Adams:

Hon. R. E. Jackson, Presiding Judge.

MRS. CLARA J. MULLINS, Admr. Est. James Davis Mullins, Deceased,

v.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Messrs: Reily & McCall, Attorneys for Plaintiff.
Ratcliff & Kennedy, Attorneys for Defendant.

1 THE STATE OF MISSISSIPPI,
County of Adams:

1st Day, Monday, March 27th, 1916.

At a Regular Term of the Circuit Court in and for the Company of Adams, State of Mississippi, Begun and Held in the City of Natchez, at the Court-house thereof, on the Fourth Monday of March, in the Year of Our Lord 1916, It Being the Day and Place Appointed by Law for Holding said Court.

Present:

Hon. Robert E. Jackson, Presiding Judge.
R. E. Bennett, District Attorney.
Frank V. Eisele, Sheriff of Adams County.
Lamar Lambert, Circuit Clerk.
W. E. Corban, Official Stenographer.

Heretofore, to-wit: On the 27th day of March, 1916, the following Amended Declaration was filed in my office, which is in words and figures as follows, to-wit:

STATE OF MISSISSIPPI,
County of Adams:

In the Circuit Court to the March Term, 1916.

CLARA J. MULLINS, Administratrix of the Estate of James Davis Mullins, Deceased.

v.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Now comes Mrs. Clara J. Mullins, Administratrix of the estate of James Davis Mullins, deceased, Plaintiff, by her attorney, and com-

plains of the Yazoo & Mississippi Valley Railroad Company, a corporation, defendant, for that heretofore to-wit:

That plaintiff is the duly appointed and authorized administratrix of the estate of James Davis Mullins, deceased;

2 That the defendant is and was on the 14th day of October, 1915, and at all times mentioned herein, a railroad corporation, owning and operating engines and cars upon tracks by the dangerous agency of steam between Vicksburg in Warren County, Mississippi, and Natchez in Adams County, Mississippi, having an office and agent and being engaged in business in Natchez, Adams County, Mississippi;

That on said date the defendant owned and operated a certain train composed of engines, tender, cars and a caboose, which was then and there at Harriston, Mississippi, a point upon the line of track of said defendant; that said defendant then and there employed servants to manage and control said train; that there was then and there in the employ of said defendant, as flagman, one James Davis Mullins, a resident of Natchez, Adams County, Mississippi, for whose estate Plaintiff is now administratrix, and brings this suit.

That it then and there became and was the duty of said defendant to furnish a safe place for its employees to work while making up said train and while catching and mounting and alighting from said train and handling and managing same; that it also became and was the duty of said defendant to then and there have its cars, engines, and caboose equipped with safe hand holds, steps, ladders, and foot holds, so that the said James Davis Mullins, and other employees of said defedant, might, with safety, catch said train, and mount same and alight from same.

That it also then and there became and was the duty of the said defendant to furnish the said James Davis Mullins and other employees with competent medical and surgical attention in the event of injury to any of them while in the discharge of his or their duty, and to promptly convey him or them to a place where they might receive medical and surgical attention, if required and necessary in the event of such injury.

That it was then and there the duty of the said James Davis Mullins, under the terms of his employment, to, when the said

3 train was ready to start from said town of Harriston, signal to the other employees of said defendant, who were then and there in charge of said train, to start said train and to then mount said train by climbing upon same by using the steps and hand holds, and ladder, and foot holds upon said train; that when the said Mullins attempted to mount the said train, as it was his duty to do, the said train being then and there moving, that the said hand holds, ladder, foot holds, and steps upon the car upon which said Mullins attempted to mount were defective and insufficient and caused the plaintiff to fall and the right arm of said Mullins was thereby broken and crushed and mangled by said train and said fall;

That the place at which the said Mullins attempted to mount said train was rough and uneven and dark, so that the said plaintiff

could not, with safety to himself, mount said train, and could not see the defective condition of the steps, hand holds, foot holds, and ladder upon said caboose; that the said hand holds, foot holds, steps and ladder upon said caboose, which were insufficient and defective as aforesaid, and caused him to fall and sustain the injuries, as aforesaid, were unsafe and dangerous, defective and insufficient and not sufficient to enable said Mullins to catch said train;

That after said Mullins fell and was crushed by said train, as aforesaid, that the said defendant, in total disregard of its duty to the plaintiff, failed and refused to furnish the said Mullins with medical and surgical attention, but allowed him to bleed profusely and suffer untold physical and mental suffering for hours before the said Mullins was furnished with medical and surgical attention; that after lingering for about ten hours and suffering the greatest physical and mental anguish the said Mullins died from the injuries so sustained by him, as above explained, and because of the failure of the defendant to furnish him with proper medical and surgical attention, as above stated.

4 That the said James Davis Mullins was a young man of sound health, and was twenty-six years of age at the time of his death, and was earning about ninety dollars per month, and was in direct line of promotion where he would have soon earned much more money;

That the death of said Mullins was caused directly by the gross and willful negligence and carelessness of said defendant in failing to furnish a safe place in which the said Mullins might discharge his said duty and mount said train, and in failing to furnish and provide a safe caboose and cars and safe hand holds, and foot holds and steps and ladders upon which plaintiff could mount the said train, which he attempted to mount at the time when he was injured, as hereinabove explicitly set forth, and in its failure to provide proper medical and surgical attention for the said Mullins after he was injured, as hereinabove stated;

That all of said failures on the part of the defendant was due to its willful carelessness and gross negligence, and in disregard of the life of said James Davis Mullins, and its other employees;

That the said Mullins suffered untold physical pain and mental anguish between the time of his injury and the time of his death; that Mullins was unmarried and left no children;

That the deceased left surviving him Clara J. Mullins, (Administratrix herein) his mother, E. L. Mullins, his father, Mrs. H. L. Lehman, his sister, Mary Mullins, his sister, Ruth Mullins, his sister, and R. M. Mullins, his brother;

That the plaintiff has qualified as, and is, the personal representative of James Davis Mullins, deceased, and brings this suit for the benefit of the heirs at law of the said James Davis Mullins, and demands damages, actual and punitive, in the sum of Forty Thousand ($40,000.00) Dollars;

Wherefore, plaintiff demands judgment of the defendant in the sum of $40,000.00.

5 Second Count.

Now comes Mrs. Clara J. Mullins, Administratrix of the estate of James Davis Mullins, deceased, plaintiff, by attorneys, and complains of the Yazoo & Mississippi Valley Railroad Company, a corporation, defendant, for that heretofore, to-wit:

That the plaintiff is a duly authorized and appointed administratrix of the estate of James Davis Mullins, deceased;

That the defendant is and was on the 14th day of October, 1915, and at all times mentioned herein a railroad corporation, owning and operating engines and cars upon tracks by the dangerous agencies of steam between Vicksburg in Warren County, Mississippi, and Harriston in Jefferson County, Mississippi, and Natchez in Adams County, Mississippi, and having an office and duly authorized agent and being engaged in business in the City of Natchez, Adams County, Mississippi;

That on said date the said defendant owned and operated a certain train of cars composed of engines, tender, cars, and a caboose, which was then and there at Harriston, in Jefferson County, Mississippi;

That said defendant then and there employed servants to manage and control said train; that there was then and there in the employ of said defendant, as flagman, one James Davis Mullins, now deceased, for whose estate plaintiff is now administratrix, and brings this suit.

That it then and there became and was the duty of the defendant to furnish a sufficient number of skilled and competent servants to manage and control said train, and it then and there was the duty of the said employees of the said defendant to exercise due care and caution in the handling and controlling of said train so that the said James Davis Mullins and other employees of said defendant would not suffer injury through their negligence;

6 That it was then and there the duty of the said James Davis Mullins, under the terms of his employment, to, when the said train was ready to depart from said station of Harriston, signal the engineer and conductor in charge of said train to start said train, and that it was then and there the duty of the said James Davis Mullins when said train had started for its destination to then mount said train by climbing upon said train by using the steps and hand holds, and ladder, and foot holds upon said train; that it then and there became and was the duty of the engineers and conductor in charge of said train to start said train gradually, so that when the time came for the said Mullins to mount same, that it would not be traveling at a rapid rate of speeds, so that the said Mullins could mount same in safety;

That when said Mullins attempted to mount said train, as it was his duty to do, because of the rapid rate at which the said train was traveling, he, the said Mullins, was jerked and thrown under said caboose, and his right arm was thereby broken and mangled by said running train; that the said Mullins was jerked and thrown under the said caboose, because of the gross negligence and willful carelessness of the said engineers and conductor in charge of said train, and while

then and there acting within the scope of their employment in running said train so rapidly that the said Mullins could not, with safety, mount same;

That after lingering for about ten hours, and suffering untold physical pain and mental anguish, the said Mullins died; that the death of said Mullins was caused directly by the gross and willful negligence and carelessness of said defendant in starting and running said train at a dangerous and rapid rate of speed at the time when the duties of the said Mullins, under the terms of his employment with the defendant, required him to mount said train;

That the said James Davis Mullins was a young man of sound health and was twenty-six years of age at the time of his death and was earning about ninety dollars per month and was in line
7 of promotion;

That the plaintiff is the duly appointed and authorized representative of the estate of said Mullins, and brings this suit as such, for the benefit of the heirs at law of the said James Davis Mullins, and demands damages, actual and punitive, for the wrongs inflicted upon the said Mullins by the said defendant as aforesaid, and for the physical pain and mental suffering of the said Mullins, as aforesaid, and for the damages and loss sustained by the heirs at law of the said Mullins, and for all damages of every nature which the plaintiff is entitled to recover under the laws of the State of Mississippi, and demands judgment in the sum of Forty Thousand ($40,000.00) Dollars.

Third Count.

Now comes Mrs. Clara J. Mullins, Administratrix of the estate of James Davis Mullins, deceased, by her attorneys, and complains of the Yazoo & Mississippi Valley Railroad Company, a corporation, defendant, for that, heretofore, to-wit:

That the plaintiff is the duly authorized and appointed Administratrix of the estate of James Davis Mullins, deceased;

That the defendant is and was on the 14th day of October, 1915, and at all times mentioned herein, a railroad corporation owning and operating engines and cars upon tracks by the dangerous agencies of steam between Memphis and other points in the State of Tennessee, and Natchez and other points in the State of Mississippi, and between Vicksburg in the state of Mississippi, and Wilson in the State of Louisiana, and various other points in the states of Tennessee, Louisiana and Mississippi, with duly authorized agents and officers and an office in Natchez, Adams County, Mississippi.

That on said date the said defendant owned and operated a certain train of cars composed of engines, cars, tenders, and a caboose, which said train of cars was then and there engaged in inter-
8 state commerce in that said train was carrying freight from points in the State of Louisiana to points in the State of Mississippi, and from points in the State of Mississippi to points in the State of Tennessee, and the State of Louisiana, and from points in the State of Tennessee to points in the State of Mississippi and

in the State of Louisiana, and was then and there running upon tracks that were used for the hauling of freight from various points in Mississippi to various points in Tennessee and Louisiana, and from various point- in Tennessee to various points in Mississippi and Louisiana, and from various points in Louisiana to various points in Tennessee and Mississippi.

That the said defendant then and there employed various servants to manage and control said train, all of whom were engaged in interstate*d* commerce; that there was then and there in the employ of said defendant, as flagman, upon said train, one James Davis Mullins, now deceased, for whose estate plaintiff now brings this suit, as administratrix.

That the said James Davis Mullins was then and there employed in interstate commerce; that it then and there became and was the duty of the said defendant to furnish a safe place for the said James Davis Mullins and its other employees to work, while mounting and alighting from and working about said train and discharging their duties in connection with said train; that it also then and there became and was the duty of the said defendant to have its cars and caboose equipped with safe hand holds, foot holds, ladders and steps, and railings, and other means and devices, so that the said James Davis Mullins, and the other employees, of said defendant might, with safety, catch said trains and mount same, and alight from same, while in the discharge of their duties;

That it also then and there became and was the duty of the said defendant to, through its duly authorized agents and servants who were then and there acting within the scope of their employment,

9 exercise due care in starting, stopping, handling and managing and running said train, and to refrain from starting said train at a rapid rate, and to refrain from running said train at a rapid rate, so that the said James Davis Mullins might, with safety, mount said train, when the duties of his employment required him to do so;

That it also then and there became and was the duty of the said defendant to furnish the said James Davis Mullins, and all of its employees, with competent medical and surgical attention, in the event of injury by him or them while in the discharge of his or their duty, and to promptly convey him or them to a place where he or they might receive proper medical or surgical attention, if necessary;

That it was then and there the duty of the said James Davis Mullins, under the terms of his employment, to, when said train was ready to depart from said town of Harriston, signal the other employees of said train to start same, and then to mount said train by climbing upon same by using the steps, and hand holds, and ladder and foot holds, and railings, and other means and devices put there for that purpose upon said train.

That when the said Mullins attempted to mount said train, as it was his duty to do, that the said train being then and there moving, that the said handholds, ladder and footholds, and steps and railings, and other means and safety devices upon the car upon which said Mullins attempted to mount, were defective and insufficient and

caused the plaintiff to fall and be struck by said train, whereby the right arm of the said Mullins was crushed and broken and bruised and his body was otherwise crushed and bruised and broken.

That the said train was moving at a rapid and dangerous rate of speed when the said Mullins attempted to mount same, and that the place at which the said Mullins attempted to mount said train was rough and uneven and dark, so that the said Mullins could not with safety to himself, mount said train and could not see the defective condition of the steps, handholds, footholds, ladder, railings, and other devices upon said caboose, which were supposed to be
10 used, and which the said Mullins was required to use in mounting said train; that the said handholds, footholds, steps, ladder, railings, and other devices upon said caboose, which the said Mullins, used and was compelled to use, were insufficient and defective and, as aforesaid, caused him to fall, as aforesaid, and that said handholds, footholds, steps, ladders and other devices were unsafe and dangerous and weak, and not sufficient to enable said Mullins to mount said train.

That after said Mullins fell and was crushed by said running train, as aforesaid, and was bleeding and bruised and suffering, that the defendant, in total disregard of its duty to the plaintiff, failed and refused to furnish the said Mullins with medical and surgical attention, but allowed him to bleed profusely and suffer untold physical pain and mental anguish for hours before the said Mullins was furnished with medical and surgical attention.

That after lingering for about ten hours and suffering the greatest physical pain and mental anguish, the said Mullins died from the injuries so sustained by him, as above explained, and because of his failure to have proper medical and surgical attention, as above stated. That the said Mullins was a young man of sound health, and was twenty-six years of age at the time of his death, and was earning about ninety dollars per month and was in direct line of promotion where he would have earned much more money, and had the expectancy of — years.

That the death of said Mullins was caused directly by the gross negligence and willful carelessness of the said defendant in failing to furnish a safe place in which the said Mullins might discharge his duty and mount said caboose, and in failing to furnish and provide safe cars, and safe caboose, and safe and sufficient handholds, footholds, steps, railings, ladders and other devices upon which the said Mullins could mount the said train, which he was attempting to mount at the time he was injured, as hereinbefore explicitly
11 set forth; and its failure to start and run said train at a reasonable rate of speed at the time at which the said Mullins attempted to mount said caboose, as it was his duty to do; and in its failure to provide proper medical and surgical attention for the said Mullins after he was injured, as hereinbefore stated; that decedent was unmarried and left no wife and children.

That there survived the said Mullins Clara J. Mullins (Administratrix herein) his mother, who was entirely dependent upon the said James Davis Mullins for support and who sustained pecuniary loss

by his death, E. L. Mullins, his father, Mrs. H. L. Lehman, Mary Mullins and Ruth Mullins, his sister, and R. M. Mullins, his brother. That Ruth Mullins, the said sister of the said Mullins was dependent upon him, and sustained pecuniary loss by his death.

That plaintiff has qualified as and is the personal representative of said Mullins, deceased, and brings this suit for the benefit of those who, under the law, are entitled to damages, because of the wrongful death of said Mullins by the said defendant, as hereinbefore set forth, and on behalf of the said Mullins, deceased, and demands damages of the said defendant, for the injuries sustained by the said Mullins, deceased, and the physical pain and mental anguish sustained by him, and the wrongs done him by said defendant, as hereinbefore set forth, and the losses sustained by the heirs at law of the said Mullins, because of his death, and for all injuries and damages and amounts which plaintiff is, as administratrix, entitled under the law, to recover, and demands judgment in the sum of Forty Thousand ($40,000.00) Dollars, against the said defendant.

M. W. REILEY,
Attorney for Mrs. Clara J. Mullins, Administratrix, Plaintiff.

Endorsed on back as follows, to-wit: In Circuit Court
12 Adams County, Miss. Mrs. Clara J. Mullins, Administratrix, Plaintiff, v. Yazoo & Mississippi Valley Railroad Co., Defendant. Amended Declaration. Filed March 27, 1916. Lamar Lambert, Clerk.

13 Afterwards, to-wit, on the 27th day of March, 1916, the following Plea was filed in my office, which is in words and figures as follows, to-wit:

STATE OF MISSISSIPPI,
County of Adams:

In the Circuit Court to March Term, 1916.

MRS. CLARA J. MULLINS, Admx. of the Estate of Jas. D. Mullins, Deceased,

v.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

Now comes the Defendant by its attorneys and for plea to the declaration filed herein pleads and says that it is not guilty of the *man* wrongs and injuries complained of against it in said declaration nor of any part thereof and of this it puts itself upon the country.

RATCLIFF & KENNEDY,
Attorneys for Defendant.

Afterwards, to wit, on the 27th day of March, 1916, the following Plea was filed in my office, which is in words and figures as follows, to-wit:

And for a further plea in this behalf the defendants say that if the said plaintiff's intestate was injured by a train of defendant, it was such an injury such as that he, the plaintiff's intestate, assumed the risk of by virtue of his contract of employment with the said defendant and the defendant is, therefore, not liable to the plaintiff for the injury and death of her said intestate, and this it is ready to verify.

RATCLIFF & KENNEDY,
Attorneys for Defendant.

Endorsed on back as follows, to-wit: Mrs. Clara J. Mullins,
14 Admx. v. Y. & M. V. R. R. Co. Plea. Filed March 27, 1916. Lamar Lambert, Clerk. Ratcliff & Kennedy.

Afterwards, to-wit, on the 3d day of April, 1916, the following Plea was filed in my office, which is in words and figures as follows, to-wit:

STATE OF MISSISSIPPI,
County of Adams:

In the Circuit Court, to March Term, 1916.

Mrs. CLARA J. MULLINS, Admx. of the Estate of James Davis Mullins, Deceased.

And now comes the Plaintiff, by her attorneys, and files this her replication to the special plea filed by the Defendant herein, and says, precludi non because she says that the injury to the Plaintiff's intestate was not such an injury and sustained in such a manner as that he the plaintiff's intestate assumed the risk by virtue of his contract of employment with the Defendant, and of this she puts herself upon the country.

REILY & McCALL,
Attorneys for Plaintiff.

Endorsed on back as follows, to-wit: Mrs. Clara J. Mullins, Admx. vs. Y. & M. Filed April 3, 1916. Lamar Lambert, Circuit Clerk.

15 On March 27, 1916, the following demand was filed in my office, which is in words and figures as follows, to-wit:

STATE OF MISSISSIPPI,
County of Adams:

In the Circuit Court, to the March Term, 1916.

CLARA J. MULLINS, Administratrix of the Estate of James Davis Mullins, Deceased,

vs.

YAZOO and MISSISSIPPI VALLEY RAILROAD COMPANY.

Now comes the Plaintiff and shows unto the Court: That, James Davis Mullins, deceased, lost his life through the fault of the Defendant, and that the said deceased lost his life while trying to mount certain cars which are in possession of said Defendant.

That said cars are now in the possession of the Defendant, and that an inspection of them by the Plaintiff and by the Jury upon the trial of this case is necessary to enable plaintiff to properly submit her case.

That the said Defendant has in its employ one A. Stephens who was the conductor upon the train upon which said deceased was working, and that said Stephens knows the speed at which the train was running, and knows the condition of the cars which the deceased attempted to mount, and that the testimony is necessary to enable the Plaintiff to develop her case.

That said Stephens is in the employ of the Defendant, and subject to the commands of the defendant, and that the Defendant can, if it desires to do so, produce him upon the trial of this case.

The Plaintiff calls upon the defendant to produce said Stephens that his testimony may be obtained upon the trial of this cause, he being a witness in the possession and under the control of the Defendant.

The Plaintiff further shows unto the Court that the Defendant has in its charge statements made by the Conductor and by the Engineer and fireman and Brakeman upon said train showing the
16 circumstances under which the said Mullins lost his life, and the plaintiff calls upon the defendant to produce same upon the trial of this cause that she may inspect them and properly prepare her case.

Plaintiff further shows that Defendant has in its control, records showing the condition of the cars at the time that the said Mullins lost his life, and that an inspection of same is necessary to enable the Plaintiff to develop her case.

Wherefore, Plaintiff calls upon the Defendant to produce said records that she may inspect same and properly prepare her cause.

M. W. REILY,
Atty. for Mrs. C. J. Mullins, Admr.

Endorsed on back as follows, to-wit: Clara J. Mullins, Admr. vs. Y. & M. V. R. R. Co. Filed March 27, 1916. Lamar Lambert, Clerk.

17 STATE OF MISSISSIPPI,
County of Adams:

In Circuit Court to March Term, 1916.

Hon. R. E. Jackson, Judge of the Sixth Circuit Court, District of Mississippi.

Number 657.

Mrs. CLARA J. MULLINS

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Attorney- for Plaintiff: Reily & McCall.
Attorney- for Defendant: Ratcliff & Kennedy.

18 MARTHA GIBSON, being called on behalf of the Plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Reily:

Q. What is your name?
A. Martha Gibson.
Q. Where do you live?
A. Harriston.
Q. You live in Harriston?
A. Yes, sir.
Q. How long have you lived there?
A. I have lived in the house I'm in for about 20 years.
Q. What is your husband's name?
A. Pole Gibson.
Q. Who does he work for?
A. Mr. Vale Farr.
Q. Who is he?
A. He is a man, a railroad man.
Q. State whether or not your husband works for the railroad company?
A. Yes, sir.
Q. How long has he been with the railroad company?
A. He has been working close about 6 years in Harriston.
Q. Did he work for the company before that?
A. Yes, sir.
Q. Do you know how long he has been working for the company?
A. No, sir, he was working for the company when I first knowed him.
Q. Do you live on the right or left hand side of the track in Harriston facing Vicksburg?

A. I live on the left hand side going.
Q. How far from the track?
A. Somewheres about 150 yards, I guess.
Q. Were you living there on October 14th, 1915?
19 A. Sure.
Q. Do you remember the time it was said Mr. James Davis Mullins was said to have been hurt there in Harriston?
A. Yes, sir.
Q. Did you know him?
A. No, sir.
Q. Did you know him when you seen him?
A. Yes, sir.
Q. You knew him when you saw him, but wasn't acquainted with him?
A. Yes, sir.
Q. Did you see him the time he was hurt?
A. Yes, sir.
Q. Was it day or night that he was hurt?
A. Before day.
Q. About what time in the morning was it?
A. It was something after four o'clock, I was up after I heard him holler and it was a little after four.
Q. It was between three and four o'clock?
A. Yes, sir.
Q. You were up?
A. Yes, sir.
Q. Did you hear the train go out?
A. Yes, sir.
Q. Do you know where the cattle gap is?
A. Yes, sir.
Q. State whether or not the cattle gap is north of the depot?
A. It is north of the depot.
Q. Do you know where that switch is just south of the cattle gap on the main line?
A. Yes, sir.
Q. Did you hear the train when it was passing that switch?
A. Yes, sir.
Q. About how fast was it running past that switch?
A. It was going fast.
20 Q. Was it going as fast as you could walk?

Objected to by counsel for defendant.
Objection sustained.

Q. It was going how fast?
A. I think it was——

Objected to by counsel for defendant.
Objection sustained.

Q. How long have you been living by that track?
A. About 20 years.

Q. Can you tell from the sound and rattling of a train how fast it is going?

A. It was going fast.

Q. Since you have been living there 20 years can you tell whether a train is running slow or fast by the sound it makes?

A. Yes, sir, I can tell whether or not it is running slow or fast.

Q. Could you tell from the sound whether there was one or two engines on that train?

A. It sounded to me like there was more racket than one engine made.

Q. What in your judgment was the speed of that train?

Objected to by counsel for defendant.

Objection overruled and defendant excepted.

Q. When it passed that switch what in your judgment would you say how fast it was running?

A. It was going fast when it passed my house.

Q. How fast can a man walk?

A. They can walk pretty fast, some of them.

Q. Say a man walks four miles an hour, if he was walking side of that train would he have been walking as fast as the train was running?

A. That train would have passed that man, the way it was running.

Q. Having heard the train, would you say it was running
21 as fast as you could run?

Objected to by counsel for defendant.

Objected sustained.

Q. State whether or not in your judgment that train was running as fast as you could run?

Objected to by counsel for defendant.

Objected overruled and defendant excepted.

A. It was running faster than I could run.

Q. You said you heard this man holler?

A. Yes, sir.

Q. Did you go to him?

A. Me and the "Old man" went down there.

Q. You mean your husband?

A. Yes, sir.

Q. What did you find when you went down there?

A. I found this man down there hurt.

Q. *You* was with you?

A. My husband, Pole Gibson.

Q. What did you find?

A. A man laying down by the track hurt.

Q. How close to the track was he?

A. His arm was laying on the track, like this.

Q. What was the condition of his arm?

A. It was mashed.

Q. His arm was crushed?
A. It certainly was.
Q. Did you see any signs on the rail?
A. Yes, sir.
Q. From the injury and from the signs on the rail and around there, state whether or not he was hit by the train?
A. It looked like the train ran over his arm.
Q. His arm was on the rail?
A. Yes, sir.
Q. Where was he hit?
A. From about here to here.
22 Q. What did you do?
A. When we got down there he told Pole to drag him out on the right-of-way, that he was going to die, and Pole said, No, sir, but we moved him away from the track so if another train come along it would not hurt him, and he said "drag me out on the right of way and leave me alone, I am going to die."
Q. What else did you do?
A. We started towards the depot to tell somebody about it, and I comes back to him before I goes and asked him how he got hurt, and he said "I missed my holt."
Q. He told you that he missed his holt?
A. Yes, sir.
Q. Did he say whether or not the train was what hurt him?
A. He said it was the train that hurt him.
Q. Do you know what position he had on that train?
A. They say he was flagman.

Objected to by counsel for defendant.
Objected sustained.

Q. What did you all do then?
A. We went down to the depot and told the young fellow about it.
Q. Who did he work for?
A. He was the operator.
Q. Did he work for — railroad company?
A. Yes, sir.
Q. Did you tell him about it?
A. Yes, sir.
Q. What did you do then?
A. We went back to him and *a*tayed around there until they got him off on the train.
Q. What year was that?
A. 1915
Q. That was at Harriston, Miss.?
A. Yes, sir.
23 Q. Are you acquainted with the railroad around where you found this man?
A. Yes, sir.
Q. Was there any light around there?
A. No, sir.

Q. That was a part of the railroad yard?
A. Yes, sir, I guess so.
Q. Was there a double track there?
A. Yes, sir.
Q. How close was that to the switch?
A. It was closest to the last switch towards the cattle gap.
Q. How close is the switch to the cattle gap?
A. I guess about a hundred yards.
Q. It is your judgment about a hundred yards?
A. Yes, sir.
Q. There was no light there?
A. No, sir.
Q. Was it a dark night?
A. Yes, sir.
Q. What was the closest light to that place?
A. The switch light.
Q. About how far was that?
A. About a hundred yards from the cattle guard.
Q. What is a switch light?
A. Just a little light on top of the switch.
Q. Are they used to light up the tracks?
A. No, sir.
Q. Was there any kind of light at all in that switching yard?
A. Did not see any.
Q. You stated there was a double track there?
A. Yes, sir.
Q. What kind of tracks were they?
A. The main line and side track.
Q. Is there a track there which is called the house track?
A. Yes, sir.
21 Q. On which side of the track did you find this man lying, facing Vicksburg?
A. He was on the right hand side of the main line facing Vicksburg.
Q. Is the house track switch above or below the place you found this man?
A. It is below.
Q. The body was between the main line and the side track?
A. Yes, sir.
Q. Did you see him any more that night?
A. Not after they put him in the caboose.
Q. Within a few days or within the next week after this occurrence did Mr. Doyle come to see you?
A. Yes, sir.
Q. Did you give him a statement of this?
A. Yes, sir.
Q. Did you swear to it?
A. Yes, sir.
Q. Do you know who was the conductor on this train?
A. No, sir, I don't know.
Q. What railroad is that?
A. Mississippi Valley.

Q. The Yazoo & Mississippi Valley?
A. Yes, sir.
Q. You live in the town of Harriston?
A. Yes, sir.
Q. Who lives on the right hand side of the track just opposite you?
A. York Banks lives across the railroad.
Q. Do you know where the corporate limits of the town of Harriston are?
A. Not exactly, I know they make us pay street taxes.

Cross-examination.

By Mr. Ratcliff:

25 Q. What time did you get up that morning?
A. I never looked at the clock when I first got up.
Q. What time was it when you got to where this young man was?
A. When we started out the door my old man looked at the clock and it was five minutes after four when we left the house.
Q. Did you go right on over there?
A. Yes, sir.
Q. Did you have a light?
A. Had a lantern.
Q. You heard the young man hollering over there?
A. Yes, sir.
Q. When you got there you did not see the train?
A. No, sir.
Q. You did not see the train at all?
A. No, sir.
Q. Where was the train when you first heard him hollering?
A. I could not say that.
Q. How far up the track was it?
A. I cannot say how far up the track it was, the train pulled out fast and I did not hear the man until the noise of the train had 'bated some, and then I heard him holler, I did not pay much attention at first, and then he hollered again so pitiful like that I woke the old man up and told him somebody was hurt, and then he hollered again "O e e e e" just so, and I said that is some white man, so we started down there and when we was coming he says "ain't you coming" and we said "Yes, sir, we's coming" and he said "come on I'm going to die," just so.
Q. How far south of the cattle guard was that?
A. About a hundred yards, I don't know exactly.
Q. That was south of the cattle guard?
A. Yes, sir.
Q. And north of the freight depot?
A. Yes, sir.
Q. Do you know what they call the house track?
26 A. Yes, sir.
Q. Where does it end?

A. There at that switch on the main line. The switch closest to where this man was hurt.

Q. You found this boy north of the house track switch going towards Vicksburg?

A. Yes, sir.

Q. How far north of the house track switch was he?

A. He was by the main line.

Q. How far north of the house track switch?

A. I don't know exactly, might have been 200 yards.

Q. About two hundred yards?

A. Might have been more or less, I don't know exactly.

Q. Did you and your husband git to him together?

A. Yes, sir.

Q. You asked how it happened?

A. Yes, sir.

Q. And he told you he missed his hold?

A. Yes, sir.

Q. Anybody else there at that time?

A. No, sir, nobody but me and him.

Q. When you- husband went down to the depot to tell some one that Mr. Mullins was hurt, you went with him and left Mr. Mullins until you returned?

A. Yes, sir.

Q. What did you do then?

A. They got him on a caboose and took him to Natchez.

Q. They fixed up an engine and a caboose and sent him on to Natchez immediately?

A. Yes, sir.

Q. How far is your house from the railroad track?

A. I have been living in that house about twenty years and my judgment is that it might be about 150 yards to where this man was hurt.

Q. About 150 yards to where this man was hurt?

27 A. Yes, sir.

Q. Did you go down to the passenger depot that morning?

A. No sir, went to the freight depot to tell the young man about this man being hurt.

Q. On a straight line, how far is it from your house to the railroad track?

A. About 120 yards, I guess.

Q. And 150 to where this man was found?

A. Yes sir.

Q. How far north of this point did the passing track stop?

A. It went on through the cattle guard way up yonder.

Q. You don't know how far?

A. No sir.

Q. That is the passing track?

A. Yes sir.

Redirect examination.

By Mr. Reily:

Q. Who did you say lived on the other side of the track?
A. York Banks.
Q. A line run straight from your house to York Banks' house where would it cross the railroad with reference to the cattle gap?
A. It would come through just a little above my house.
Q. If you would take a string and tie it to your gallery post and tie the other end to York Banks' gallery post and stretch it tight, where would it cross the track with reference to the cattle guard?
A. It would be south of the cattle guard.
Q. How far south of the cattle guard?
A. I could not say how much south it would be.
Q. Has there been any change in the tracks or grounds there since this thing occurred?
A. No sir, not that I know of.
Q. The conditions are the same?
28 A. Yes sir.

Recross-examination.

By Mr. Ratcliff:

Q. Did you see York Banks that night?
A. No sir, he was down in Louisiana with the water works man.

Mr. Ransom Heirtzler being called on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Reily:

Q. What is your business?
A. Telegraph operator.
Q. Who are you working for?
A. The Y. & M. V.
Q. The Yazoo & Mississippi Valley Railroad Co.?
A. Yes sir.
Q. The defendants in this suit?
A. Yes sir.
Q. Do you remember the occasion when it was said on the 14th of October that young Mullins was hurt there in Harriston?
A. Yes sir.
Q. Where are you located now?
A. Harriston.
Q. Where were you located then?
A. Harriston.
Q. Do you work day or night.
A. Night.
Q. Do you remember the occasion when it was said young Mullins was hurt?

A. Yes sir.
Q. Was it day or night?
A. Night.
29 Q. About what time of night?
A. About four o'clock.
Q. You do not know the exact time?
A. No sir.
Q. How did he get into Harriston?
A. He came in on the freight he was flagging for.
Q. What was the first knowledge that you had of the injury?
A. Pole Gibson came and told me about it.
Q. You got your information from him?
A. Yes sir.
Q. What did you do?
A. There was another freight in there and I went and told the conductor that the flagman was hurt.
Q. What was his name?
A. Mr. Lang.
Q. Who was he employed by?
A. The Y. & M. V.
Q. In what capacity?
A. Conductor.
Q. You notified him he was hurt?
A. Yes sir.
Q. What did you do?
A. Telephone- for a doctor.
Q. Who did you phone for?
A. Dr. Harrison.
Q. The railroad physician?
A. Yes sir.
Q. Did he say he would come?
A. No sir.
Q. Said he would not come?
A. He said he did not think it necessary.
Q. Did you explain how he was hurt?
A. Told him his arm was cut off.
Q. What did Dr. Harrison say?

Objected to by counsel for defendant.
30 Objection overruled and defendant excepted.

A. He said he did not think it was necessary.
Q. What did you do then?
A. Called up Dr. Lewis.
Q. Who is Dr. Lewis?
A. The company's physician.
Q. Where does he live?
A. Fayette.
Q. He is the county contractor?
A. I don't know.
Q. Don't you know he is road contractor?
A. Yes sir.

Q. Was he a regular practising physician?
A. I don't know anything about that.
Q. Isn't it a fact that he has quit practising medicine and *in* the county contractor?
A. I know he has a contract for working some roads, I don't know anything about him having quit practising medicine.
Q. What did he say?
A. I did not talk to him, I left the message with the exchange to be delivered to him.
Q. You don't know what conversation took place?
A. No sir.
Q. Did you take any steps to notify any of the authorities here in Natchez, the hospital, or any of the employees of the company?
A. No sir.
Q. What did you do?
A. I wired the dispatcher at Wilson and he was to notify Mr. Montgomery.
Q. Who is Mr. Montgomery?
A. Agent at Natchez.
Q. Agent of the Company at Natchez?
A. Yes sir.
Q. Who is the dispatcher?
31 A. Mr. Sheets.
Q. It was your duty to notify him?
A. Yes sir.
Q. Did you notify him?
A. Yes sir.
Q. Do you know what he did?
A. No sir.
Q. What Montgomery is that?
A. R. L. Montgomery.
Q. What else did you do?
A. That was all I did.
Q. Did you see Mr. Mullins?
A. No sir.
Q. What kind of train was this?
A. Ordinary freight train.
Q. Where running?
A. From Wilson to Vicksburg.
Q. Wilson is in what state?
A. Louisiana.
Q. Vicksburg is in what state?
A. Mississippi.
Q. The train was running from Wilson, Louisiana, to Vicksburg, Mississippi?
A. Yes sir.
Q. State whether or not it hauled cars?
A. Yes sir.
Q. And cars of freight?
A. Yes sir.
Q. Did it leave any cars at Harriston?

A. It was doing some switching there?
Q. How was Mr. Mullins employed on that train?
A. Flagman.
Q. On that train?
A. Yes sir.

Q. Do you know how long he had been flagman on that
32 particular train?

A. No sir.

Q. At what other points was that train hauling and leaving freight.
A. I don't know anywhere from Wilson to Vicksburg.
Q. How long had Mullins been flagman?
A. I don't know.
Q. After you notified Mr. Sheets what did you do?
A. That was all I did, I turned over the running order to the conductor to proceed to Natchez.
Q. When did that train pull out for Natchez?
A. 4:35.
Q. 4:35?
A. Yes sir.
Q. I thought you told me it was 3:40?
A. That was the train that Mullins was flagging on.
Q. The train Mullins was flagging on left at 3:40 and the other train left at 4:30?
A. Yes sir.
Q. You remember that?
A. It is on the register.
Q. Harriston is a registering station?
A. Yes sir.
Q. You made a report to the railroad of this?
A. Yes sir.

Cross-examination.

By Mr. Ratcliff:

Q. What was the number of that train on which Mullins was flagging?
A. I don't remember the numbers of the engines, it was an extra. I think one engine was No. 7.
Q. Do you remember what time it was when you first heard of the accident?

A. It was about 4:15 or 4:20.

33 Q. What did you do immediately after you heard the accident happened?

A. I went to Mr. Lang and told him to get his engine turned and caboose and be ready by the time I could get running orders.
Q. You did that immediately?
A. Yes sir.
Q. Do you know of anything that you could have done that you did not do?

A. No sir, all I could do was to get him to the hospital as quick as I could.

Q. Is there any doctor in Harriston?

A. No sir.

Q. Where is the nearest doctor?

A. In Fayette.

Q. How far is it from Fayette to Harriston?

A. About 3 miles.

Q. What was the quickest way to get a doctor to this young man?

Objected to by counsel for plaintiff.

Objection overruled and plaintiff excepted.

A. The quickest way was for the doctor to meet the train at Fayette.

Q. There was a regular train coming to Natchez that morning?

A. Yes sir.

Q. That had left when you heard about the accident?

A. Yes sir.

Q. This was only an engine and caboose?

A. Yes sir.

Q. What train was Mr. Lang on?

A. He had a freight switching there in the yard.

Q. Where did he come from?

A. I don't remember.

Q. Was he at work on the main line?

A. I don't remember that.

34 Q. What engine, if you know, did he come in on?

A. Engine 51, I don't remember whether it came from Wilson or Vicksburg. It was facing north when I heard of the accident and had to be turned to go to Natchez.

Q. You took that engine and caboose and sent the young man to the Hospital?

A. Yes sir.

Q. Was that the only available engine and caboose?

A. It was.

Q. They happened to be in there at that time?

A. Yes sir.

Q. You did not go up to where the young man was found?

A. No sir.

Q. All you did was to try to get him to the hospital as quick as you could?

A. Yes sir.

Redirect examination.

By Mr. Reily:

Q. Who was the conductor on the train this young man was flagging on?

A. Mr. A. Stephens.

Q. Where is he now?

A. I don't know.

Q. When did you see him last?
A. I don't remember, some time ago.
Q. Was he in the employment of the company when you saw him last?
A. Yes sir.

Dr. SESSIONS being called on behalf of the plaintiff and being first duly sworn, testified as follows:

Direct examination.

35 By Mr. Reily:

Q. You are a practising physician?
A. Yes, sir.
Q. Have you any connection with the Natchez Sanatorium?
A. Yes sir.
Q. What is the connection?
A. I am one of the directors of it and I have my office there.
Q. You are a general practitioner?
A. Yes sir.
Q. Do you remember an occasion on October 14th, 1915, when a young man by the name of James Davis Mullins reached the Sanatorium?
A. Yes sir. I did not know his name at that time, however.
Q. Was it a young man with his arm cut off?
A. Yes sir, his arm crushed.
Q. Do you recognize his mother here?
A. I don't know that I do.
Q. His brother here?
A. I believe I do, now.
Q. What does the records of the sanatorium show?
A. J. D. Mullins.
Q. What information did you receive of his coming?
A. I had a telephone message, I think from the passenger depot in Natchez.
Q. Do you know what time you received that message?
A. Some time about 5 o'clock in the morning.
Q. About 5 o'clock in the morning?
A. Yes, sir, about that.
Q. Had the train arrived at that time?
A. I am not sure, I think it had.
Q. What did you do?
A. I got up and dressed as quickly as I could and went to the depot.
Q. How did you go?
A. In my automobile.
36 Q. How far do you live from the depot?
A. About ¾ of a mile.
Q. How long a time after you received the message before you arri-ed at the depot?
A. 15 or 20 minutes.

Q. You got there as soon as you could?

A. Yes sir.

Q. What did you find when you got there?

A. I found Mr. Mullins lying in the car with his right arm mangled from the point of the shoulder to his wrist.

Q. What kind of car was that?

A. I really cannot say, I don't remember if it was a box car or a coach, there was nothing to impress it on my mind.

Q. Had he been bleeding any?

A. Yes sir.

Q. Do you remember the blood dripping through the car on to the ground?

A. Did not see that, there was some blood on his clothing and around where he was lying.

Q. What was the condition of the arm, had it been wrapped or bandaged?

A. No sir.

Q. There had been nothing done to stop the flow of the blood?

A. No sir, there was not bandage or anything.

Q. The first thing to do in an injury is to stop the flow of the blood?

A. Well, yes, if it is bleeding much, some wounds where the vessels are spouting blood it becomes necessary of course to take up the blood vesels, but in other wounds the blood just gradually oozes out, like in this case.

Q. There was a good deal of ozzing in this case?

A. Yes sir.

Q. There was mashed?

A. Yes sir, it was a crushing wound.

Q. Looked like it had been made by a car wheel?

37 A. Yes sir, a car wheel would have made that kind of wound.

Q. There was blood in the car?

A. Yes sir.

Q. From his physical condition, did it appear that he had lost considerable blood?

A. His physical condition was such that it might have been caused by the shock, or the loss of blood, or both.

Q. Was his hand still han*d*ing?

A. Yes sir.

Q. Tell us what a shock is?

A. It is the impression received by the nervous system on the brain which has been caused by an injury.

Q. State whether or not the loss of blood makes the heart beat faster?

A. Yes sir, very rapidly.

Q. In the case of a shock like this, state whether or not it is best to remove the cause of the shock as quickly as possible?

A. That would depend entirely on circumstances, in some cases a removal of the cause of the shock by an operation will help and in

other cases an operation would increase instead of diminish the shock, it depends on the judgment entirely.

Q. In this case if the arm had been removed at the time of the injury would it have increased or diminished the shock?

A. I could not say, it might have and might have not.

Q. You made a report to the company?

A. Yes sir.

Q. You are the company's physician?

A. Yes sir.

Q. When was the party admitted into the sanatorium?

A. According to this record it is 5:40 or 5:46, I cannot tell which.

Q. Did that boy live or die?

A. He died.

Q. Was he operated on?

A. Yes sir.

38 Q. How long afterwards?

A. He died at 1:45 P. M.

—. How long after the operation was completed?

A. The operation was begun at 7:00 and completed at 8:01.

Q. What was the cause of his death?

A. I put the cause at that time as "Shock and hemorrhage."

Q. What does hemorrhage mean?

A. Loss of blood.

Q. He died from shock and loss of blood?

A. Yes sir.

Q. Doctor, if this man had reached your sanatorium one hour earlier than he did, in your judgment would his chances have been better or worse?

Objected to by counsel for the defendant.

Objection sustained and plaintiff excepted.

Q. If he had reached the sanatorium 30 minutes earlier would his chances have been better or worse?

Objected to by counsel for the defendant.

Objection overruled and defendant excepted.

A. Of course in cases like that time is always an advantage, especially if there is much hemorrhage, 30 minutes might have made some difference, and in this case I will say I expect his chances would have been a little better if he had reached us 30 minutes sooner.

Q. State whether or not his general condition would have been stronger or weaker.

A. Stronger.

Q. Doctor, state whether or not in case of an operation like that strength is an advantage?

A. Sure, strength means a good deal.

Q. If he had reached you 30 minutes earlier, and lost less blood, you say in your judgment his chances would have been better?

Objected to repeating by counsel for defendant.

Objection sustained.

Q. Doctor, from his condition, what would you say was his general condition, with the exception of the injury?

A. He was apparently a strong, vigorous man before the injury.

Q. Doctor, in your judgment if this man's arm had been removed in Fayette, one hour or 45 minutes before he reached Natchez, and had been removed by a competent physician or surgeon, would this man have died?

Objected to by counsel for defendant.

Objection overruled and defendant excepted.

Q. Answer the question.

A. That is a very hard question to answer. If the arm had been removed he would probably have lost less blood and his chances would have been better, but I want to say this, that to make that kind of operation the surgeon would have to have proper instruments and unless he did have them——

Objected to by counsel for the plaintiff.

Objection overruled.

—unless he did have the proper instruments and the ready appliances I would not advise an operation, especially when he was such a short time from a hospital.

Q. I will ask you this question: It is in evidence that the injury took place about 3:40 or 3:45 and the man was discovered 5 or 10 minutes after 4, if there had been a competent surgeon in Harriston properly equipped and could have gotten to this man in 25 or 30 minutes after he was hurt, state whether or not this man would have died.

Objected to by counsel for defendant.

Objection sustained and plaintiff excepted.

Q. What should have been done, if a doctor got on the train at Fayette and came to Natchez with this man?

A. Well, he should search to see if there was anything necessary to be done immediately in order to save his life, or to better his chances by saving strength, in other words, to see if there was any hemorrhage going on, and to make him as comfortable as possible and relieve any pain, and to place the injured part in as comfortable a position as possible.

Q. The flow of blood should be stopped?

A. Yes sir, any hemorrhage should be taken up.

Q. How could that be done?

A. By binding the arm or by taking up the blood vessels if necessary.

Q. Had this man's arm been treated in that way?

A. No sir.

Q. It had not stopped bleeding?

A. Not entirely.

Q. State whether or not he was lying in a passenger coach?

A. I don't remember.

Q. State whether or not he was bleeding when you found him?
A. The blood was oozing some.

Cross-examination.

By Mr. Ratcliff:

Q. You did not know anything about this until you were called?
A. No sir.
Q. You don't know what time the train got in there?
A. No sir.
Q. Your records show that you got him to the sanatorium at 5:46?
A. Yes sir, 5:40 or 5:46, I can't make out the last figure.
Q. Did you respond as promptly as you could?
A. I did.
Q. When a patient is put in charge of a physician the treatment depends on the judgment and discretion of the physician, does it or does it not?
A. Yes sir, it depends entirely on the physician's judgment as to what should be done.
Q. I will ask you, in a major operation, such as the amputation of an arm, is — advisable, except in cases where it is absolutely necessary, without the proper instruments, disinfectants, and
41 so on?
A. No sir, it is not, it is advisable to wait longer to get a place fixed for that class of work.
Q. You could not tell how much blood this man had lost?
A. No sir, there is no way of determining the amount of blood lost.
Q. You don't know anything about this man's condition before you took him in charge?
A. No sir.
Q. You could not say what should have been done unless you knew his condition?
A. I could only say that the hemorrhage should have been controlled if there was any.
Q. What time did you operate on him?
A. Anæsthetics were started at 6:45, operation at 7:09 and completed at 8:01, anæsthetics being stopped at that time.
Q. Do you know whether or not during the time before you saw him after the injury, the blood was oozing as you testified to?
A. I judge from the looks of him when I saw him that it had been.
Q. That is what you base your judgment on?
A. Yes, sir.
Q. Were you present when he was moved from the car to the sanatorium?
A. Yes, sir.
Q. After you removed this young man did you notice how much blood was there?
A. No sir, I never tried to determine that, I was only after getting him to the sanatorium as quickly as possible, and never noticed that.

Q. Doctor, after you got to him did you do everything for him that could be done?

A. Yes sir, I did.

Q. You, as a surgeon, did everything that could have been
42 done, even after thinking it over now?

A. Yes sir, under the same circumstances, I would do the same thing over again.

Q. There was nothing left undone that should have been done?

A. No sir, not after he got in my charge.

Q. And you say that when you now look back over it, you would give the same treatment under the same conditions?

A. Yes sir.

Q. You reported his death as caused from shock and hemorrhage?

A. Yes sir.

Q. I will ask you to state whether or not there is always a shock when any one is injured?

A. Yes sir, there is always a shock?

Redirect examination.

By Mr. Reily:

Q. Was the bone broken in that arm?

A. It was crushed.

Q. Badly?

A. Yes, sir.

Q. What portion of the arm was crushed?

A. From just below the shoulder to the wrist.

Q. Just a mangle of bone and flesh?

A. Yes, sir.

Mr. Ed. Appleby being called on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Reily:

Q. Did you know Mr. Mullins?

A. Yes sir.

Q. Do you know about what was his age?

A. No sir.

Q. How are you employed?

A. Conductor *of* the Y. & M. V.

43 Q. You are a conductor for the Yazoo & Mississippi Valley Railroad Company?

A. Yes, sir.

Q. Do you remember the occasion when it was said that Mr. Mullins was hurt?

Q. Yes sir.

Q. You were at that time conductor on the night train?

A. Yes sir.

Q. What time did you leave here that night?

A. 7:05.
Q. How far is it to Harriston?
A. 28 miles, on- way.
Q. You come back and went again?
A. Yes sir.
Q. When did you leave the second time?
A. 12:05.
Q. When did you arrive?
A. 1:25.
Q. Do you remember on this particular night what was the first you heard of this young man being hurt?
A. When I got to the house some one rang the house and my wife answered the phone.
Q. That night you got it?
A. Yes sir.
Q. What did you do?
A. Went immediately to the station.
Q. Do you know where the message come from?
A. Someone rang and my wife answered the phone.
Q. You went immediately to the yards?
A. Yes sir.
Q. At that time where were you living?
A. North Commerce, third house from the railroad.
Q. How far from the depot?
A. About three blocks.
Q. When you got there was Mr. Mullins there?
44 A. He was in the caboose.
Q. What kind of a caboose?
A. Standard caboose.
Q. The kind they use on freight trains?
A. Yes sir.
Q. He was lying down on the cushion?
A. Yes sir.
Q. At that time was Dr. Sessions there?
A. Did not see him.
Q. How long before Dr. Sessions came?
A. I went to see if the ambulance was coming and when I got back Dr. Sessions was there.
Q. The ambulance wasn't there when you got there?
A. No sir.
Q. It came shortly afterwards?
A. Yes sir.
Q. Did you hear the train come in to Natchez?
A. Yes sir.
Q. Where were you when it blowed for Natchez?
A. I was on Commerce Street about where the Hops live.
Q. When the train blowed for Natchez?
A. Yes sir.
Q. What time did it get in?
A. I think the register shows 5:30, I got in at 5:05.
Q. You put that on the register?

A. Only my train.
Q. You did not register the other train?
A. No sir.
Q. You don't know what time it was?
A. No sir.
Q. How long after you heard about this before you was down there?
A. 5 or 6 minutes, just the time it takes to walk about 3 blocks.
Q. How long before you saw Dr. Sessions?
A. I cannot say.
Q. How long before you saw the ambulance coming?
A. I did not see it at all. I went to one corner to watch for
45 it and it came down another street.
Q. You don't know how long before the ambulance arrived?
A. No sir.
Q. Can't you give us the benefit of your best judgment about that?
A. No sir, because I never noticed that particularly.
Q. State whether or not there was any blood in the coach?
A. Did not see any.
Q. Did you go in there?
A. I went in there a short time, saw him with his injured arm next the side of the car and did not stay but a very little while.
Q. State whether or not the blood was dripping through the car to the rocks beneath?
A. No sir.
Q. Do you know anything further about the case?
A. No sir, that's about all I know.
Q. You just went down there?
A. Yes sir.
Q. How was this man employed?
A. As flagman.
Q. Running where?
A. I understand he was running on this occasion from Wilson to Vicksburg.
Q. Wilson, Louisiana, to Vicksburg, Mississippi.
A. Yes sir.
Q. Flagman on a freight train?
A. Yes sir.

Cross-examination.

By Mr. Ratcliff:

Q. How long have you been conductor?
A. About 13 years.
Q. Working for the Y. & M. V. all that time?
A. Yes sir.
46 Q. Have you ever worked as flagman?
A. Yes sir.
Q. Do you know the duties of a flagman?
A. Yes sir.
Q. You know the duties of the train crew?
A. Yes sir.

Q. If at the time a flagman is going to board a train and it is running too fast for him, in his judgment, to safely board it, what is his duty?

A. It is his duty to flag them down.

Q. Flag and stop it?

A. Yes sir.

Q. State to the jury under such conditions what the full duty of the flagman is, suppose the train did not stop when he flagged?

A. If he saw the train was going so fact that he could not catch it and he would flag and they would not stop——

Objected to by counsel for plaintiff as it is not based upon facts introduced in evidence.

Objection overruled and plaintiff excepted.

Q. If a train upon which a flagman was working had done a lot of switching and was ready to leave and the flagman had authorized the engineer to pull out, is it his duty to get on then?

A. I cannot say. If he is about middle ways of the train he could get on then and walk back to the caboose, or if he wanted to he could wait for the caboose and catch on to it.

Q. That is a matter of judgment for the flagman to decide?

A. Yes sir, that is left to him.

Q. But if he would undertake to board a train and it was going too fast for him what is his duty?

A. Flag it down until he can board it.

Q. You were asked about the time it took you to get to the depot after you heard about this?

47 A. Yes sir.

Q. You made no notation of that time?

A. No sir.

Q. What is your running time between Harriston and Natchez?

Objected to by counsel for plaintiff.

Objection overruled and plaintiff excepted.

A. From one hour and ten minutes to one hour and 20 minutes.

Q. You did not know about this other train following you until you got home?

A. No sir.

Q. You registered at 5:05?

A. Yes sir.

Q. Where were you when you heard this other train?

A. On my way home.

Q. How far from your home?

A. About a block or a block and a half?

Q. You were about home?

A. I was at the front gate when it passed the house.

Q. Did you hear it when it got to the depot?

A. Yes sir.

Q. When you got home you went back there?

A. Yes sir.

Q. Do you know what time this other train got in there?

A. It registered at 5:30.
Q. What kind of train did you bring in?
A. Mixed train, freight cars and passenger coaches.
Q. This train that brought Mr. Mullins in was only an engine and caboose?
A. Yes, sir, what we call a special.

Redirect examination.

By Mr. Reily:

Q. In your judgment, in what time should an engine and caboose come from Harriston to Natchez with only a minute or two stop in Fayette?
48 A. That depends on the engine, some engines run faster than others, but I will say between 45 minutes and an hour and five minutes.
Q. Did you notice this engine?
A. No sir, I don't remember it now.
Q. You were in Harriston on the night this happened?
A. Yes sir.
Q. Are you familiar with the yards north of the freight depot, between the freight depot and the cattle gap?
A. I think I know where the cattle gap is, it has been a good while since I ran a freight train through there.
Q. I will ask you if it isn't true that it is the duty of the engineer to pull out at such speed that it will enable the flagman to safely board the train?
A. I cannot say that it is, if the flagman thinks that the train will be going too fast before the caboose gets to him he can catch a car and walk back to the caboose.
Q. This happened in October?
A. Yes sir.
Q. When it is cold the flagman does not travel on top of the train?
A. As a general thing, no sir.
Q. He travels in the caboose?
A. Yes sir.
Q. I will ask you if it isn't a fact that it is easier to catch a caboose than an ordinary passenger coach?
A. I should say a standard caboose would be easier to catch.
Q. Do you know wheth-r or not they had a caboose or passenger coach on this train?
A. I don't know.
Q. At three o'clock in the morning it is dark, and hard to catch a fast running train?
A. As I said, if it was going too fast he could flag it down with his signal lantern.
Q. If the engineer was looking back he would see the
49 signal and stop?
A. Yes sir.

Q. If he was not looking back, he would not see the signal and of course he would not obey it?

A. The flagman should stand right there if they did not slow down.

Q. When a train is going forward is it the duty of the engineer to look backwards?

A. I don't know about the duty, but they glance backwards all right.

Q. You don't know how fast this train was going?

A. No sir.

Q. You don't know whether or not the engineer looked back?

A. No sir.

Recross-examination.

By Mr. Kennedy:

Q. Did you know Davis Mullins?

A. Yes sir.

Q. How long had you known him?

A. He has been on the road 4 or 5 years, I think, I have known him about that long.

Q. Do you know how long he has been working for the company?

A. I think it was about 3 years.

Q. Three years as flagman?

A. Yes sir.

Q. State whether or not it is one of the duties of the flagman to familiarize himself with the switches and yards over which he has to work?

A. Yes sir, he has to learn them.

Q. That is one of his duties?

A. Yes sir.

Q. How about the tracks?

A. He is supposed to be familiar with the tracks and switches.

50 Q. And to know their location and condition?

A. Yes sir.

Q. How long had he been running through Harriston?

A. About 3 years, I think.

Redirect examination:

By Mr. Reily:

Q. Isn't it the duty of an engineer to look back and see that all are safely aboard before he pulls out of the place?

A. I don't know of any rule covering that, but it is the general custom.

Mr. Elmer Lees being called on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Reily:

Q. What is your business?
A. Locomotive engineer.
Q. Who for?
A. The Y. & M. V.
Q. Did you know James Davis Mullins?
A. Yes sir.
Q. Do you remember the time he was injured?
A. Yes sir.
Q. What business was he engaged in at that time?
A. They said he was a flagman, I suppose he was.
Q. What run have you?
A. Night run between here and Harriston.
Q. You are an engineer for the company?
A. Yes sir.
Q. Run between here and Harriston?
A. Yes sir.
Q. Are you familiar with the yards in Harriston?
A. I am with the south end of the yard.
51 Q. Do you know how far north you go?
A. Not exactly.
Q. Do you know where that cattle gap is?
A. Yes sir, I sometimes go that far.
Q. You sometimes go as far north as the cattle gap?
A. Yes sir, the one just above the house track switch.
Q. State whether or not there is two tracks there?
A. Yes sir.
Q. The main line and what is the other?
A. The other is the passing track.
Q. Where is the house track?
A. It leads off from the main line.
Q. State whether or not it is near the coal shute?
A. It is north of the freight depot.
Q. That is the house track?
A. Yes sir.
Q. State whether or not that yard is used considerably for switch cars and trains backwards and forwards?
A. Yes sir.
Q. A good many cars are handled there?
A. Yes sir.
Q. Use it to make up trains?
A. Yes sir.
Q. State whether or not freight is carried backwards and forwards through there, and transferred there?
A. Yes sir.
Q. That is true up as high as the cattle gap?
A. Yes sir, I use it up that far.
Q. I will ask you if that is part of the railroad yard?
A. I suppose so.

Q. What are the duties of a flagman?
A. Quite a number of them.
Q. Give us some of them?
A. Switching cars and protecting his train.
Q. It is his duty in switching to couple and uncouple cars?
A. Yes sir, with the brakeman.
52 Q. That is done on the yard?
A. Yes sir.
Q. That would take him sometimes as high up as the switch just south of the cattle gap?
A. I suppose so, I work that far up.
Q. Do you see other trains that high up?
A. Yes sir.
Q. This particular night did you go that high up?
A. No sir.
Q. How long since you have been up there?
A. I cannot say, might have been a week or two weeks.
Q. Do you know the condition of that part of the yard that night?
A. No sir.
Q. Where were you when you first heard of this man being hurt?
A. In the yards at Natchez.
Q. Did you know when it came in?
A. Yes sir, I was in the wash room changing my overhalls when I heard the extra blow and wondered what it was.
Q. What did you do?
A. Went out on the yards and heard that young Mullins was hurt.
Q. What did you do then?
A. Went down to see Mullins.
Q. Did you see him?
A. Yes sir.
Q. Where was he?
A. On the cushions in the caboose.
Q. Was he conscious?
A. Yes sir.
Q. Did you talk to him?
A. Yes sir.
Q. Did he say he was suffering?
A. He did not say.
Q. Was he bleeding?
A. Yes sir, he was bleeding.
53 Q. Do you know to what extent?
A. No sir, he was laying on that side.
Q. Did you see any blood in the coach?
A. Could not see from the way he was laying.
Q. He was laying on his side?
A. Yes sir.
Q. You are still with the company?
A. Yes sir.
Q. You are employed by them now?
A. Yes sir.

Q. As a matter of fact, state whether or not he was bleeding so that the blood was dripping through the coach on to the ground?

Objected to by counsel for defendant.
Objection overruled and defendant excepted.

A. Yes sir.
Q. I understand you to say that the blood was dripping through the bottom of the coach?
A. I saw it dripping on to the ground.
Q. How long before the ambulance come?
A. I don't know exactly, 35 or 40 minutes.
Q. Did you see the ambulance when it come up?
A. Yes sir, I was ther- when it come up.
Q. How long after it got there before he was taken away?
A. Just as soon as they could put him in the ambulance.
Q. Do you know from where the message for the ambulance was sent?
A. No sir.

Cross-examination.

By Mr. Ratcliff:

Q. What time did your train get in that night?
A. 5:05.
Q. Do you know when this other train got in?
A. No sir, about 5:30 or 5:35, I never paid much attention to time.
Q. Do you know Mr. Lewis?
A. Yes sir.
Q. Was he in the caboose?
A. Yes sir.
Q. He lives at Fayette?
A. Yes sir.
Q. Do you know whether or not he came in with the caboose?
A. I cannot say.
Q. You saw him with Mr. Mullins?
A. Yes sir.
Q. Did you go into the caboose?
A. Yes sir.
Q. Did you move the injured arm?
A. No sir, I picked up the good hand.
Q. You did not move the other arm?
A. No sir.
Q. Did the wounded arm have any clothing on it?
A. No bandage on it.
Q. Have any clothing on it?
A. Just the tatters of the sleeve.
Q. How was he lying?
A. I never paid much attention.
Q. You made no critical examination of the injured arm?
A. No sir.

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Q. Did you see any blood coming out of the arm?
A. I could not see from the way he was laying.
Q. You saw the blood dripping from the caboose where he was laying?
A. I saw that from the outside.
Q. Was that all the blood you saw?
A. Yes sir, I could not tell whether his arm was bleeding or not.
Q. Could not tell about that?
A. No sir.
55 Q. What time did you leave Harriston that morning?
A. I don't know exactly, we were evidently late in leaving as we arrived in Natchez 35 minutes late.
Q. Do you know how far it is from the freight depot to the cattle gap?
A. No sir.
Q. Can you give me an idea?
A. I should say about a city block, of course I may be wrong as I have never had any particular occasion to notice the distance.
Q. Where did you go after Mr. Mullins was removed?
A. I went on home.
Q. Who brought that train in?
A. Tony Lang.
Q. Where was the caboose standing at the time you noticed the blood?
A. On the main line by the sleeper I had just brought in, the engine was between the sleeper and caboose.
Q. Mr. Mullins was lying on the cussioned bench in the caboose?
A. Yes sir.

Redirect examination.

By Mr. Reily:

Q. In what part of the coach was he lying?
A. North end, I believe.
Q. Was there a light in there?
A. There was a lamp in there.
Q. Just one little lamp?
A. A regular caboose lamp.
Q. What kind of cushion was he laying on?
A. I just know it was a cushion, I never paid any close attention.
Q. As you are leaving Harriston to go to Vicksburg there is a grade?
A. I don't know, sir, I would call it straight.
56 Q. But there is a grade there?
A. I could not say.

Recross-examination.

By Mr. Kennedy:

Q. Speaking of the tracks in Harriston, there are three tracks there together are there not?

A. Yes sir, for a short distance.

Q. There is a main line, a passing track, and house track?

A. Yes sir.

Q. You said something about trains being made up there, what trains are made up there?

A. I meant by that, that cars were picked up and left there.

Q. You simply mean that cars are switched back and forth there?

A. Yes sir, that is what I understand by making up a train.

Q. Do you know how long Mr. Mullins had been flagging for the Y. & M. V. through Harriston?

A. I don't know.

Q. Do you know whether he ever worked through there?

A. He has, because he has worked with me through there.

Q. It is one of the duties of the flagman to be familiar with the switches which he is called upon to handle?

A. Not necessarily, because he may be placed on an extra run he has never been over before.

Q. Do you know whether or not Mr. Mullins was familiar with the yards at Harriston?

A. I suppose so, I know he had run through there with me several times.

Q. There are only two switches up there?

A. The passing track and the house track.

Redirect examination.

By Mr. Reily:

Q. State whether or not the passing track switch is some distance beyond the cattle gap?

57 A. Yes sir.

Q. The house track switch is just south of the cattle gap?

A. Yes sir, some little distance.

Mr. Ransom Heirtzler being re-called on behalf of the plaintiff and having been previously sworn, testified as follows:

Direct examination.

By Mr. Reily:

Q. When that train pulled out, the train that Mr. Mullins was flagging on, where was the caboose standing with reference to the freight depot?

A. The caboose was just about even with the depot, possibly 5 or 10 feet below the depot.

Mr. Fred Moss being called on behalf of the plaintiff and having been duly sworn, testified as follows:

Direct examination.

By Mr. Reily:

Q. What official position are you holding at present?

A. I am Town Marshal of Harriston.
Q. How long have you been Marshal?
A. Ever since last October.
Q. State whether or not you collect the street taxes?
A. Yes sir.
Q. Do you know where the town limits of Harriston are?
A. Yes sir.
Q. With reference to that cattle gap, how far south of it is the town limits of Harriston?
A. About 90 feet south.

Objected to by counsel for the defendant.
Objection overruled and defendant excepted.

Q. About 90 feet south of the cattle gap?
A. Yes sir.
58 Q. Have you had occasion to pass along there frequently?
A. Every day or two.
Q. Do you know where that switch is south of the cattle gap?
A. Yes sir.
Q. That switch on the main line?
A. Yes sir.
Q. State whether or not on that portion of the yards, freight is switched backwards and forwards over those tracks there?
A. Yes sir, I think they do.
Q. Freight cars of the Y. & M. V. are switched over it?
A. Yes sir.
Q. Has there been any change in the grounds or tracks since this accident happened?
A. Not that I know of.
Q. State whether or not you are around there constantly?
A. Yes sir.
Q. Any change made that you know of?
A. No sir.
Q. No changes at all made?
A. None that I have seen or know of.

Cross-examination.

By Mr. Ratcliff:

Q. How long have you been marshal?
A. I was appointed in October last and was elected in December.
Q. Have you ever measured from that cattle gap to the crossing?
A. I saw it measured.
Q. What was the distance?
A. 90 feet.
Q. Who did you see measure it?
A. Some men that come there with Mr. Reily.
Q. Who were they?
A. I don't remember their names.
Q. Do you know where they live?
A. I think they live here, I see them here.

59 Q. Who pointed out the place to measure from?
A. I pointed out the corporation line.
Q. Do you know where this young man was found?
A. No sir, I never saw him until he was placed in the caboose.
Q. Has the place been pointed out to you where it is said he was found?
A. Yes, sir, the negro woman that found him pointed out the place to me.
Q. Where is Main Street in the town of Harriston?
A. South of the depot.
Q. That is the street that crosses both railroads, the main line and the Natchez branch?
A. Yes, sir.
Q. It is south of the passenger depot?
A. Yes, sir.
Q. This young man was found how far north of that?
A. The place pointed out to me was north of the freight depot.
Q. How far north of the passenger depot is the freight depot?
A. Several hundred feet.
Q. The freight depot is several hundred feet north of the passenger depot?
A. Possibly three or four hundred feet.
Q. What size place is Harriston?
A. Just a small place of about 200 people. I think there are 50 tax payers.
Q. What direction does the main line run there?
A. The general direction is north and south.
Q. And Main Street crosses it east and west?
A. Generally speaking, yes sir.
Q. You did not see anything of this occurrence until he was placed in the caboose?
A. No, sir.

Redirect examination.

By Mr. Reily:

60 —. How many trains pass through Harriston every day?
A. Sometimes there are a good many.
Q. State whether or not that is the connecting point of trains from Natchez, Vicksburg, and Jackson?
A. Yes, sir.
Q. The yard is used for that purpose?
A. Yes, sir.

Mr. Wilbur Dorson being called on behalf of the plaintiff and having been duly sworn, testified as follows:

Direct examination.

By Mr. Reily:

61. Where do you live?

A. Natchez.
Q. Do you know James Davis Mullins?
A. I was slightly acquainted with him.
Q. State whether or not you had occasion to go to Harriston recently?
A. I went with you last Sunday a week ago.
Q. At whose request did you go?
A. Yours.
Q. For what purpose did you go?
A. To secure some measurements along the railroad track in regard to the accident.
Q. Who went with us?
A. Mr. Henon Day and Mr. John Roghelio.
Q. Did you make the measurements?
A. Yes sir.
Q. Did you make a memorandum of the distances?
A. Yes sir.
Q. I hand you what purports to be a sketch or map, state whether or not when you were in Harriston you compared this sketch with the grounds out there?
A. Yes sir.
61 Q. State whether or not it is a correct representation of the location of the tracks, etc., out there?
A. Yes, sir, it is.
Q. You say you compared it with the tracks and grounds in Harriston?
A. Mr. Day, Mr. Roghelio, and myself did.
Q. Where did you take your measurements from?
A. We started at the railroad crossing, the crossing of the main line and the Natchez & Jackson branch.
Q. Is that north or south of the passenger depot?
A. North of the passenger depot.
Q. State whether or not there is a coal chute there?
A. Yes sir.
Q. State whether or not that is the place where engines take on coal?
A. Yes sir.
Q. This point here represents the crossing?
A. Yes sir.
Q. Do you know whether or not Wilson is on the main line?
A. Yes sir.
Q. And Vicksburg?
A. Yes sir.
Q. Mr. Dorson, from where these tracks cross north of the passenger depot to the first switch, how far is it?
A. I will say that the distances are approximated by counting the rails, the distance to the first switch is 130 feet.
Q. What did you approximate the rails to be?
A. We figured they would average 30 feet.
Q. State whether or not that first switch is south of the freight depot?

A. It is south.

Q. How far is it from where these tracks cross is it to the south end of the freight depot?

A. About 410 feet.

Q. From where the tracks cross to the north end of the
62 freight depot how far is it?

A. 558 feet.

Q. How far from where the tracks cross is it up to the second single switch on the main line?

A. About 610 feet, no it is 610 feet to the first single switch.

Q. 610 feet to the first single switch, how far is it to the second single switch?

A. About 1207 feet.

Q. From where the tracks cross to the third single switch how far is it?

A. About 1770 feet.

Q. From where the tracks cross up to the cattle gap, how far is it?

A. 2060 feet.

Q. I believe you said you figured the distance by counting the rails?

A. Yes sir.

Q. Did you measure the rails and average their length?

A. Yes sir, measured several rails and averaged their length at 30 feet.

Q. State whether or not this track which leaves the main line here again comes back into the main line?

A. Yes sir, it does.

Q. Is there a switch at the point where it leads back into the main line?

A. There is.

Q. How far is that switch from the crossing of the two tracks?

A. 1770 feet.

Sketch is here introduced and marked "Exhibit No. 1" to Mr. Dorson's testimony, and to be made part of record.

Q. You did not see the accident?

A. No sir.

Q. Did any one point out to you the corporate limits of the town to you?

63 A. Yes sir.

Q. How far south of the cattle gap was it?

A. About 90 feet.

Q. You don't know the point where Mr. Mullins was hurt?

A. No sir.

Q. Did you notice the condition of the road bed and track between the cattle gap and say a point three or four hundred feet south of it?

A. Yes sir.

Q. State whether or not that is a double track there?

A. Yes sir, there are two tracks there, the main line and a siding.

Q. What is the condition of the road bed there, is it even or not, between those two tracks?

A. It is not even.

Q. State whether or not the ground between the tracks is as high as the tracks?

A. No sir, the ground between the tracks is 10 or fourteen inches lower than the top of the rail.

Q. If a man were standing on the south side of the main line and wanted to catch a train about that switch just below the cattle gap, what kind of ground would he have to run or walk over?

A. The ground is very rough, it is freshly gravelled and the cross-ties stick out from two to five inches above the top of the ground.

Q. State whether or not there is loose rock there?

A. Yes sir.

Q. State whether or not that ground along there was of such a nature that a man could not with safety catch a train?

Objected to by counsel for defendant.

Objected sustained.

Q. State whether or not the ground is even along there?

A. No sir, the ground is much lower than the track.

Q. You walked along there, did you not?

64 A. Yes sir.

Q. State whether or not you could easily walk over there?

A. No sir, on the loose rocks your foot would slip back, you could not get a good foot holt.

Cross-examination:

Q. Are you a railroad man?

A. No sir.

Q. Have you ever had any experience with railroad tracks?

A. No sir.

Q. I understood you to testify that these tracks over in Harriston were above the ground?

A. Yes sir.

Q. Were the rails on the cross-ties?

A. Yes sir.

Q. You meant to say that the track is elevated above the ground?

A. I mean the tracks are uneven.

Q. Do you mean the tracks are uneven or do you mean the ground around the tracks?

A. I mean the ground between the tracks is uneven.

Q. The track itself is not uneven?

A. No sir, I don't know about that, the rails looked even.

Q. You say there is some gravel around there?

A. Yes sir.

Q. As a matter of fact isn't gravel used on railroad tracks as a ballast?

A. Yes sir.

Q. Isn't it a matter of common knowledge that gravel is used to make a more solid foundation?

A. That is my understanding?

Q. If you had been a flagman and had been running through Harriston for several years, and was familiar with all the switches around there, would you not know the condition of the ground there?

65 A. I should think so, all you have to do is to look and you will see the condition.

Q. Was that gravel in such a condition that any person going along there frequently would not notice it or could not see it?

Objected to by counsel for plaintiff.

Objection overruled and plaintiff excepted.

A. If he would look he would see the condition.

Q. You say that track was elevated above the ground, could any one see that?

A. Yes sir.

Q. Who pointed out the city limits to you?

A. Mr. Moss.

Q. The gentleman that just left the stand?

A. Yes, sir, I think so.

Q. Do you know from where he got his information?

A. Only what he told us.

Q. You don't know that the corporate limits of the town of Harriston is 90 feet from the cattle gap?

A. I only know that was the place pointed out to us.

Q. Who measured these distances?

A. They were not measured with a tape line, we counted the rails.

Q. You averaged the rails at 30 feet?

A. Yes sir.

Q. Who measured them and said they were 30 feet?

A. Mr. Day and Mr. Roghelio.

Q. Did you see them measure the rails?

A. I did not look at the line.

Q. You don't know how long the rails are?

A. I know what they measured them to be.

Q. All the information you have is based upon what some one told you?

A. I counted the rails.

Q. Some one told you how long the rails were?

66 A. Yes sir.

Q. You said that crossties were sticking up out of the ground?

A. The ends of the ties were from two to five inches above the surface.

Q. Was that just one or two ties or several?

A. That was the condition from the cattle gap some distance south.

Q. Was the place where this man was found pointed out to you?
A. Yes sir.
Q. On which side of the track was it?
A. Right side of the main line looking north.
Q. Which track is the main line there?
A. The left track as you look at it.
Q. Where was that gravel and ties you were talking about?
A. Between the main line and side track.
Q. Whereabouts?
A. Along by the switch there.
Q. Around the switch that comes into the main line on the left side?
A. Yes sir.
Q. Do you know what track that is?
A. They called it the house track.
Q. Do you know where it is?
A. Yes sir.
Q. What line does the house track run into?
A. Main line.
Q. From the west side?
A. I don't know east from west out there, it is the left side.
Q. Those tracks run north and south don't they?
A. I understand they do.
Q. That would make it the west side?
A. Yes sir.
Q. The gravel and ties you speak about were around that switch?
A. Yes sir.

Q. You say the city limit is a point 90 feet south of the
67 cattle gap?
A. Yes sir.

Q. How far from this cattle guard does this rough ground you are talking about extend?
A. For 300 feet south of it.
Q. Back how far into the city limits?
A. About 200 feet.
Q. Did you measure the distance from the house track switch to the cattle gap?
A. Yes sir.
Q. What is the distance?
A. About 9 2/3 rails, or 290 feet.
Q. Do you know where Mr. Mullins' body was found?
A. No sir.
Q. You don't know where he was standing when he went to board the train?
A. No sir.

Redirect examination.

By Mr. Reily:

Q. State whether or not this loose gravel and cross-ties you were testifying about extended from the cattle gap several hundred feet south of this house track switch?

A. I don't know that I noticed it that far, but it was in that condition about 50 feet on each side of that switch.

Q. State whether or not there was fresh gravel all along there?

A. Yes, sir.

Q. State whether or not the gravel extended from the freight depot to the cattle guard?

A. It did.

Q. Do you know how a man catches a train?

A. Yes sir.

Q. State whether or not he stands on the track when he catches a train?

A. No sir.

68 Recross-examination.

By Mr. Kennedy:

Q. You only noticed the gravel being uneven fifty feet on each side of that switch?

A. I only took particular notice of that.

Mr. JOHN ROGHELIO being called on behalf of the plaintiff and being first duly sworn, testified as follows:

Direct examination.

By Mr. Reily:

Q. Do you live in the city of Natchez?

A. Yes sir.

Q. State whether or not you had an occasion to go to Harriston Sunday before last?

A. I did.

Q. At whose request?

A. Yours.

Q. For what purpose?

A. To take some measurements.

Q. Did you and Mr. Day and Mr. Dorson make the measurements?

A. Yes sir.

Q. Do you know whether or not Mr. Dorson made the memorandum of the measurements on the back of this paper?

A. Yes sir.

Q. Are these the notations made by him?

A. Yes sir.

Q. Did you help measure any of the rails?

A. Yes sir.

Q. What did they average?

A. 30 feet.

Q. Did you notice the cattle gap out there?

A. Yes sir.

Q. State whether or not there is a switch south of the cattpe gap?

69 A. Yes sir.

Q. State whether or not there are two tracks along there?

A. Yes sir.

Q. Did you notice the conditions in and around those tracks?

A. Yes sir.

Q. How far south of the cattle gap did you notice it?

A. Down to about the freight depot.

Q. What is its condition?

A. There is fresh gravel all along the track and between them.

Q. Did you walk over that gravel?

A. About four times.

Q. Could you walk over it with ease?

A. No sir, the gravel was soft and your foot would slip backwards?

Q. State whether or not you have ever seen a man mount a train?

A. Yes sir.

Q. If a man wanted to catch a train that was running on the main line and he was 15 or 20 feet south of that cattle gap state what kind of ground he would have to run over?

A. He would have pretty rough ground, and the ties are higher there than the surface of the ground.

Q. How far back does that condition extend?

A. Three or four hundred feet.

Q. Does it extend to the north end of the freight depot?

A. Yes sir, it is gravelled all the way and is pretty rough.

Q. Loose rocks around there?

A. Yes sir, loose gravel all along there.

Q. State whether or not you could walk with any degree of speed?

A. No sir, you would slip.

Q. What were the condition of the ties along there?

A. They extended about 12 inches out from the rails and the ends were from 2 to 5 inches above the surface.

Q. What is the condition of the ground between those two tracks?

70 A. It is rough with gravel and is about 12 inches lower than the tracks.

Q. State whether or not, after your seeing those tracks, a man who was on the east side of the main line could mount a train pulling out of the yard towards Vicksburg with safety?

Objected to by counsel for defendant.

Objection sustained and plaintiff excepted.

Q. How far away from this track was the ground uneven?

A. Right up to the ends of the ties.

Q. What is gravel composed of?

A. Cinders and rocks.

Cross-examination.

By Mr. Kennedy:

Q. You saw this track?

A. Yes sir.

Q. Were the rails on the cross-ties?
A. Yes sir.
Q. Was it a level track?
A. The tracks and ties were level.
Q. So there is nothing the matter with the track?
A. The ties extend from 2 to 5 inches above the surface of the earth.
Q. Did you ever see a man mount a train?
A. Yes sir.
Q. Did he stand on the cross-ties to mount a train?
A. No sir.
Q. He stands back from the cross-ties?
A. Little distance probably.
Q. What is the distance between those two tracks?
A. About 8 feet.
Q. There is gravel through there?
A. Yes sir.
Q. Don't you know as a matter of fact that the gravel is used to build railroads?
71 A. Yes sir, but ties don't stick up out of the ground.
Q. There was gravel between the tracks—could a man mount a train there when it was still?
A. Yes, he could mount a still train there.
Q. Could he do it with ease?
A. He could get on a still train all right.
Q. How do you mean about the cross-ties—do they stick out beyond the rail unevenly?
A. They extend past the rail about 12 inches.
Q. That is the way all tracks are built?
A. Yes sir.
Q. Then there is nothing wrong with the ties?
A. The edges of them stick up above the surface of the earth.
Q. The cars extend out over the cross-ties do they not?
A. Just about.
Q. Those cross-ties would not hinder a man from mounting a train?
A. The center between those two tracks was about twelve inches lower than the track, though.

Mr. HENON DAY being called on behalf of the plaintiff and being first duly sworn, testified as follows:

Direct examination.

By Mr. Reily:

Q. Do you remember going to Harriston Sunday a week ago?
A. Yes sir.
Q. At whose request?
A. Yours.
Q. For what purpose did we go?
A. To make some measurements.

Q. When we got out there, state whether or not we measured the distances?

A. Yes sir.

Q. Do you remember whether you and Mr. Roghelio
72 measured the single rails?

A. Yes sir.

Q. What did they average?

A. 30 feet.

Q. How many did you measure?

A. 6 or 8 or 10.

Q. How did they run?

A. From 28 to 30, we averaged 30 feet.

Q. Did any of them run over 30?

A. I think so.

Q. 30 feet was the average?

A. Yes sir.

Q. Did you observe the main line track out there?

A. Yes sir.

Q. Facing north out there what is the condition of the road bed south of the cattle gap some distance, say as far back as the freight depot?

A. It is freshly gravelled.

Q. Have you ever seen a man mount a train?

A. Yes sir.

Q. Do you know where he stands?

A. Sure.

Q. Tell the jury the condition of the ground out there a man would have to stand on to mount a train?

A. It's in pretty bad shape, the ties are four or six inches above the ground and there is fresh gravel along there that has been washed, it looks like, and is rough.

Q. State whether or not the place he would have to stand is lower than the track?

A. Yes sir, a good deal, it would be difficult to mount a train there.

Q. Did you measure that distance?

A. Yes sir.

Q. How much lower is the place he would have to stand than the rails?

73 A. In some places it is 16 inches.

Q. What is the condition just north and south of that switch just south of the cattle gap?

A. Bad shape.

Cross-examination.

By Mr. Kennedy:

Q. What is your business?

A. Carpenter.

Q. Have you ever worked for the railroad?

A. Yes sir.

Q. What kind of work?

A. On the bridge gang.
Q. Do you know anything about railroad construction?
A. No sir.
Q. Can you tell when a track is in bad shape?
A. No sir.
Q. Road bed?
A. No sir.
Q. You mean the ground side of the track, that is what you were talking about?
A. I meant the ground a man would have to run over to catch a train was in bad shape.
Q. You did not mean the road bed?
A. No sir, the track itself seemed to be in good shape.
Q. You said the cross-ties stuck out 4 or 6 inches above the gravel.
A. Yes sir.
Q. Tell the jury whether or not that is faulty construction?
A. What is that.
Q. You said that road was in bad shape, tell the jury how cross-ties sticking out four or six inches above the ground would affect a man trying to catch a train?
A. Why he would stumble over them in catching a train.
Q. He would stumble over them in catching a train?
74 A. He might.
Q. You tell me a man running along catching a train would stumble over the cross-ties?
A. Yes sir.
Q. I understand that you have seen people mount trains?
A. Yes sir.
Q. *What* it running or standing still?
A. It was running.
Q. How far does the cross-ties stick out past the rails?
A. About two feet.
Q. Ain't it a fact that the steps of a car stick out over the cross-ties?
A. I don't know about that.
Q. You still tell the jury that the cross-ties would be in the man's way?
A. Since thinking about it I don't believe they would.
Q. Could a man standing on the cross-ties mount a train?
A. No sir, not hardly.
Q. So those cross-ties were not in the way?
A. The ground there was so much lower than the track that a man could hardly mount a train.
Q. Could he mount it standing still?
A. Yes sir, he could mount it standing still.
Q. He could mount it with ease?
A. It would be inconvenient then.
Q. It would be dangerous even when still?
A. I don't think a person's life would be in danger.
Q. It would be inconvenient?
A. A man would have to pull himself up to the train.

Q. A man standing there wanting to catch the train coming could see the nature of the ground, couldn't he?
A. If he would look.
Q. Nothing to keep him from seeing it?
A. No sir.

75 Q. Was Mr. Wilbur Dorson out there?
A. Yes sir.
Q. Were you with him?
A. Yes sir.
Q. You examined where he did and he examined behind you?
A. We went over it together.
Q. Who pointed out the various places?
A. We did that ourselves.
Q. What did you all go over there for?
A. To measure the track.
Q. Is that all you did?
A. Yes sir.
Q. You did not discuss the condition of things?
A. No sir.
Q. Did not talk about this gravel being there?
A. No sir.
Q. Never mentioned it?
A. Some one might have said something about it, I don't remember.
Q. You don't remember mentioning it?
A. No sir.
Q. You say there was a lot of loose gravel there?
A. Yes sir.
Q. Wasn't it put in there as a ballast and gradually sloped away from each track?
A. No sir, it might have been that way once, but it had washed and was rough.
Q. What month was that?
A. March, 1916.
Q. This occurrence was in October, 1915.
A. Yes sir.
Q. You don't know what was the condition at that time?
A. No sir.
Q. This gravel you are talking about is between the passing track and the main line?
A. I don't know the passing track.

76 Q. It is between those two tracks that extend on through the cattle gap?
A. Yes sir.
Q. Do you know where the house track is?
A. No sir.
Q. There is a switch just south of the cattle gap?
A. Yes sir, there are several tracks there, I don't know one from the other.
Q. This gravel is between those two tracks?
A. Yes sir.

Redirect examination.

By Mr. Reily:

Q. Did you walk over that gravel?

—. ——.

Q. State whether or not you could walk over it with ease?
A. No sir, it was loose and you would slip.
Q. What time was that?
A. Four or five o'clock.
Q. Day or night?
A. Day.

Miss Ruth Mullins being called on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination.

By Mr. Reily:

Q. What is your name?
A. Ruth Mullins.
Q. Where do you live?
A. In Natchez.
Q. What relation are you to James Davis Mullins?
A. I am his sister.
Q. How old are you?
A. 20 years.
Q. Was James Davis a married man?
A. No sir.
77 Q. He has no wife and no children?
A. No sir.
Q. Where are you living now?
A. With my mother.
Q. With your mother?
A. Yes sir.
Q. What is your mother's name?
A. Clara Mullins.
Q. Have you any sister?
A. Yes sir, two.
Q. Who are they?
A. Martha Lehman and Mary Mullins.
Q. Where is Martha Lehman?
A. At Oldenburg, Mississippi.
Q. Where is Mary Mullins?
A. Jackson, Mississippi.
Q. Have you a brother?
A. Yes sir.
Q. What is his name?
A. Robert Mullins.
Q. Where does he live?
A. Natchez.
Q. You are James Davis Mullins' sister?

A. Yes sir.
Q. His mother is Clara Mullins?
A. Yes sir.
Q. This is your mother here?
A. Yes sir.
Q. Do you work?
A. No sir.
Q. Who supported you at the time of James Davis' death?

Objected to by counsel for defendant.
Objection overruled and defendant excepted.

A. He did.
Q. How much a month did he give you?

78 Now comes the defendant and objects to this evidence because the evidence shows that this case falls under the federal employee's liability act and that the witness, as the sister of the deceased, has *not* interest in this controversy.
Objection overruled and defendant excepted.

Q. Did he help your mother?
A. Yes sir. He gave me all the spending money I wanted, anywhere from 10 to 15 dollars a month.
Q. Did he buy your clothes?
A. He always paid for them.
Q. He paid for them?
A. Yes sir.
Q. Do you know what Davis got a month?
A. Somewhere around $90.
Q. Do you know how long he had been working for the railroad?
A. Five years.
Q. Do you know how old he was?
A. 26 years.
Q. Was he a healthy boy?
A. Just as healthy as could be.
Q. Strong and robust?
A. Yes indeed.
Q. He bought your clothes?
A. Yes sir.
Q. And gave you spending money?
A. Yes sir.
Q. About 10 or 15 dollars a month?
A. Yes sir.
Q. Did he give your mother any for you?
A. Yes sir.
Q. Did you see him after he was hurt?
A. Not while he was alive.
Q. What position did he have?
A. Flagman.
Q. What train did he run on?
79 A. He was an extra man.

Q. Do you know what train he was running on at that time?
A. On that particular night he was on a train from Wilson to Vicksburg.
Q. How long had he been on that particular run?
A. That was his first trip.
Q. He was an extra man?
A. Yes sir.
Q. Do you know what points he had been running on?
A. He had been running on the southern division from Wilson to New Orleans, mostly, he run through Memphis a while.
Q. Was he working for the Yazoo & Mississippi Valley Railroad Company?
A. Yes sir.
Q. The defendant in this suit?
A. Yes sir.

Cross-examination.

By Mr. Ratcliff:

Q. Miss Mullins, do you know how long your brother had been working for the Y & M. V.?
A. 5 years.
Q. He run through Harriston a while?
A. He run over the road wherever they put him.
Q. Do I understand you to say that he had never run through Harriston before this trip?
A. On that train he was on.
Q. What train was he on?
A. The one from Wilson to Vicksburg.
Q. In those five years he had never made a trip like that before?
A. I don't know whether he had ever made one exactly like that or not, that was the first trip like that that I know anything about.
Q. How do you know that was the only trip like that he made?
80 A. Because the yard man at Wilson said that.
Q. Did he tell you that?
A. Yes sir.
Q. What was the man's name?
A. Mr. Mitchell.
Q. When did he tell you that?
A. When brother was buried.
Q. He had never been through Harriston before?
A. I suppose he had run through Harriston before.
Q. How long had he run on the main line?
A. I don't know just how long.
Q. You don't know anything about what run he had?
A. That was the first trip that I know of.
Q. Where had he run before that?
A. Wherever they put him.
Q. Where did they put him?
A. Wherever they needed him.

Q. Where had he been running?
A. From Wilson to New Orleans.
Q. You don't mean to say that in five years' time he had not run through Harriston frequently?
A. I don't know that he has run through there frequently.
Q. Did he run to Harriston with Mr. Lees a while?
A. Yes sir, for a short while.
Q. Wasn't he on this Jackson run a while?
A. Yes sir, he was there a while.
Q. That would necessitate him going through Harriston?
A. Yes sir, but there is a difference between a mixed train and a regular old freight.
Q. That particular train was an extra, was it not?
A. I think it was.
Q. That particular train had never made a trip before?
A. I don't know about that, don't reckon it had made that trip before.
Q. You say he gave you about 15 dollars a month?
A. Yes sir, for my own use.
Q. In addition to that he paid for your clothes?
81 A. Yes sir.
Q. And then he gave your mother some money for you?
A. Yes sir.
Q. How much money did he give your mother?
A. He gave her about 50 dollars a month, sometimes a little more and sometimes a little less.
Q. He gave you $15 and gave your mother $50?
A. Yes sir.
Q. Were your clothes to come out of the $50 or not?
A. Yes sir, that included the clothes.
Q. That was included in the $50?
A. Yes sir.
Q. How old was your brother when he died?
A. 26 years old.
Q. Do you know when he was born?
A. Take 26 years from now.
Q. You don't remember the day of the month he was born?
A. I don't remember.
Q. Then how did you figure how old he was?
A. I knew it.
Q. You don't remember when he was born?
A. No sir.
Q. Do you know how much of the $50 your mother spent on you?
A. She spent what I needed.
Q. About how much did that amount to?
A. Wasn't the same each month, sometimes it took nearly all of it and again it didn't.
Q. Would it average half?
A. Yes sir.
Q. Do you think it would average over a half of it?
A. Sometimes.

Q. The average of each month you think would be about half of it?

A. Yes sir.

Q. Is your brother's father living?

A. Yes sir.

Q. How many other brothers have you?

A. One.

82 Q. Did you- other brother support this one?

A. Not unless he got sick, then he would help him some.

Q. Was that included in the $50?

A. No sir.

Q. That was outside of that?

A. Yes sir.

Q. When this brother was sick he would help him?

A. Yes sir, when he was sick and unable to work he would help him.

Q. To what extent did he help him?

A. He would give him money.

Q. How much would he give him?

A. Whatever he needed.

Q. He would give him whatever he needed?

A. Yes sir.

Q. How many sisters have you?

A. Two.

Q. One married?

A. Yes sir.

Q. At the time of your brother's death did he help your married sister?

A. Helped her by sending her child to school.

Q. He helped send her child to school?

A. Yes sir.

Q. How much did that amount to?

A. She lived with us at home and he helped keep up the home, and he helped that way.

Q. That was in the $50?

A. Yes sir, and he would give her spending money, when she would ask him for it.

Q. How much did he give her?

A. Well, for moving pictures he gave her a dollar every pay-day.

Q. Gave her a dollar every pay-day.

A. Yes sir.

Q. How often was he paid?

A. Twice a month.

83 Q. And he gave her a dollar every pay day?

A. Yes sir.

Q. Your other sister is not married?

A. No sir.

Q. Did he help her?

A. When she was at home he would help her.

Q. Was she at home?

A. No sir, had not been for a good while, she was there sick a good while and he supported her.
Q. How much did he give her?
A. Well, I don't know what he gave her, just whatever she needed.
Q. About what average?
A. I cannot say. When she was at home some of the 50 dollars was for her and he gave her some money besides, I don't know how much.
Q. You don't know how much extra he gave her?
A. No sir, just what she needed.
Q. Did he help your father any?
A. No sir, I don't think so.

Redirect examination.

By Mr. Reily:

Q. Are you married?
A. No sir.
Q. Never have been?
A. No sir.
Q. You live with your mother here?
A. Yes sir.
Q. Were you dependent on your brother for a living?

Objected to by counsel for defendant.
Objection overruled and defendant excepted.

A. Yes sir.

Mrs. Clara J. Mullins being called on her own behalf, as plaintiff, and being duly sworn, testified as follows:

84 Direct examination.

Q. What is your name?
A. Clara J. Mullins.
Q. Is your husband living?
A. He was the last time I heard of him.
Q. Are you and he living together?
A. No sir.
Q. State whether or not he supports you?
A. He does not.
Q. How long have you been living apart?
A. Nearly twelve years.
Q. What relation are you to James Davis Mullins?
A. He is my son.
Q. Where do you live?
A. In Natchez.
Q. What is your age?
A. 60 years.
Q. What is the condition of your health?

A. It is very good for a woman 60 years old.
Q. James Davis is now dead?
A. Yes sir.
Q. What was his health at that time?
A. He was in fine health.
Q. State whether or not he was a strong vigorous man?
A. Yes sir, he was a healthy strong man.
Q. What was his business at the time he lost his life?
A. Flagman for the Y. & M. V.
Q. Working for what company?
A. Yazoo & Mississippi Railroad Company.
Q. What run did he have at that time?
A. On that particular night he was on a train from Wilson to Vicksburg.
Q. Wilson, Louisiana, to Vicksburg, Mississippi?
A. Yes sir.
Q. On a train of the Y. & M. V. Company?
A. Yes sir.
85 Q. Employed as flagman?
A. Yes sir.
Q. Whereabouts do you live in Natchez?
A. I live on South Union.
Q. With whom?
A. I rent a part of the Scrubbs house.
Q. You say your son was 26 years old?
A. Yes sir.
Q. When was his last birthday?
A. 12th of Last August, 1915, he was 26 years old.
Q. To what extent was he helping you?
A. Every month he would give me close around $50, sometimes it would be a little more and sometimes a little less, but he tried to make it as near $50 as he could.
Q. How much was he getting a month?
A. About $90.
Q. Do you know whether or not he was in line for promotion?
A. He was.
Q. How long had he been flagman?
A. 5 years.
Q. Do you know how long he had made that night run from Wilson to Vicksburg?
A. That was his first trip out on that run.
Q. Did he leave any money with you for Miss Ruth?
A. Of course, Ruth is young and it took more money for her than it did for me. It took very little for me and Ruth used the biggest part of the money.
Q. He knew it was being used for her?
A. Yes sir.
Q. State whether or not he gave you the money with the understanding it was being used for her?
A. Yes sir.
Q. State whether or not you were dependent on your son?

A. Yes sir, very much so.
Q. Is Miss Ruth able to work?
A. No sir, she is not, Judge.

Cross-examination.

86 By Mr. Ratcliff:

Q. What average per month did your son give you?
A. Just about $50 per month.
Q. It would average about $50 per month?
A. Yes sir, and he gave Ruth spending money outside of that.
Q. What amount did he give you the month before he died, if you remember?
A. I don't remember exactly, I can tell you what was the amount of the last check I got for his work. It was $30 for one-half month.
Q. You don't remember the amount of the other pay day?
A. No sir.
Q. Your testimony is that he gave you an average of $50 per month?
A. Yes sir.
Q. Out of that Miss Ruth's needs were to be supplied?
A. Yes sir.
Q. She got the biggest part of it?
A. Yes sir, her clothes of course cost more than mine.
Q. Did he help any of the other children?
A. When my other daughter was at home sick of course he helped her, and she living there of course he provided the home for her.
Q. Did he give her any other money?
A. Occasionally he would give her money for clothes.
Q. Did she depend entirely on him?
A. No sir, she did not.
Q. Did your other son depend on him for support?
A. No sir
Q. Your married daughter did not?
A. No sir, my married daughter had a child that we kept and sent to school and of course he helped her in that way and gave the child some spending money like any uncle would do.
Q. About how much spending money did he give the little child?
A. About two dollars a month.

Q. You say the greater portion was spent on Miss Ruth,
87 would you say 30 or 35 dollars a month?

A. Not hardly that much, I don't suppose it would average over $25.
Q. When were you 60 years old?
A. 1st of last October.
Q. When was your son, James Davis, born?
A. 1889, 12th of August.

Redirect examination.

By Mr. Reily:

Q. Did your husband help your daughter, Miss Ruth?
A. No sir.
Q. Where is he living?
A. Last I heard of him he was living in Franklin County.
Q. You don't get any help from him at all?
A. No sir.

Mr. C. W. WILSON being called on behalf of the plaintiff and being first duly sworn, testified as follows:

Direct examination.

By Mr. Reily:

Q. What is your business?
A. Insurance man.
Q. Do you represent the standard insurance companies of this country?
A. Yes sir.
Q. State whether or not those companies have a standard mortuary table?
A. Yes sir.
Q. It shows the expected life of a man?
A. Yes sir.
Q. What is the life expectancy of a healthy robust man who was 26 years old on the 12th of August, 1915?
A. 38 years and 12 days.
Q. What is the life expectancy of a healthy person 60 years old on the 1st of October, 1915, a lady?
A. They make no difference between man and woman, it
88 would be 14 years and 10 days.

Cross-examination.

By Mr. Ratcliff:

Q. That table does not take into consideration whether it is a man or a woman?
A. No sir, that seems to make no difference.
Q. That is a table based on the fact that the person is in sound health and engaged in the ordinary pursuits of life?
A. Yes sir, it is based on good health.

Plaintiff rests.

Now comes the defendant and moves the court to require the plaintiff to elect upon which count of the declaration she will stand on, whether under the state law or under the federal law.
Motion overruled and defendant excepted.
Now comes the defendant and moves the court to rule out the evi-

dence offered herein and instruct the jury peremptorily for the defendant because the evidence fails to show that the defendant has been guilty of any negligence whatever which produced any injury or caused the death of the plaintiff's decedent and because under the Federal Act it is required that the plaintiff must show affirmatively that the negligence of the defendant was the proximate cause of the injury or death and because in this action, the evidence showing that at the time of the injury resulting in death he was employed in interstate commerce—that there is no prima facie case by reason of any State statute because the Federal Statute supersedes the State Law.

Motion overruled and defendant excepted.

89 Mr. A. W. DURKEE being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Kennedy:

Q. What is your business?
A. Engineer.
Q. Railroad engineer?
A. Yes sir.
Q. What company do you work for?
A. Y. & M. V.
Q. Were you summoned as a witness in this case?
A. Yes sir.
Q. Who by?
A. The Plaintiff.
Q. Between what points do you run?
A. Between Vicksburg and New Orleans.
Q. How long have you been on the train?
A. 15 years.
Q. How long have you been an engineer?
A. 13 years.
Q. Do you remember an occasion in Harriston when it is said Mr. Mullins was hurt?
A. Yes sir.
Q. Where were you that night?
A. On engine No. 7.
Q. How many engines on that train?
A. Two.
Q. Which engine was yours?
A. Second engine.
Q. Which side of the engine do you work on?
A. Right side.
Q. That would be the east side going north?
A. Yes sir.
Q. Where did you all come from that night?
A. From Wilson.
Q. Where were you going?

90 A. Vicksburg.
Q. About what time did you get to Harriston?
A. Around two o'clock, and waited for No. 15.
Q. What is number 15?
A. Passenger train.
Q. Who was your fireman?
A. Buchannan.
Q. Who was in the engine ahead of you?
A. Hugh Gilmore.
Q. Who was his fireman?
A. I don't know.
Q. Who was the conductor on that train?
A. Author Stevens.
Q. Who was flagman.
A. Mullins.
Q. Anybody else on that train?
A. Brakeman.
Q. What is his name?
A. I don't know.
Q. Negro boy?
A. Yes sir.
Q. Was it George Hunter?
A. I don't know.
Q. There were on that train, as I understand you, two engineers, two firemen, one brakeman, one flagman, and one conductor?
A. Yes sir.
Q. What direction were you going?
A. North.
Q. Where did you stop your train when you first pulled in?
A. South passing track.
Q. South of the passenger depot?
A. Yes sir.
Q. Was Mullins there at that time?
A. Yes sir.
Q. What did you do on the south passing track?
A. Meet 15.
Q. What is 15?
91 A. Memphis Express train.
Q. Passenger train?
A. Yes sir.
Q. It had to go by?
A. Yes sir.
Q. You had to get on the siding and let it by?
A. Yes sir.
Q. What did you do after 15 passed?
A. Pulled up to the coal chute and took on coal and water.
Q. What did you do then?
A. We set some cars out on the house track.
Q. Where was Mr. Mullins then?
A. I don't know, Mr. Gilmore was doing that.
Q. Mr. Mullins was helping with the switching?

A. Sure.
Q. After you set out the cars where did the train go?
A. Coupled up on the main line.
Q. With reference to the house track switch where was the engine?
A. Just about the house-track switch.
Q. Was that the front engine or yours?
A. Front engine.
Q. Do you know which car you set out on the house track?
A. Not exactly, four or five cars back from the engine.
Q. After you set out the car you coupled up?
A. Yes sir.
Q. Who did the coupling and uncoupling and giving the signals?
A. The flagman and brakeman.
Q. Who was the flagman?
A. Mullins.
Q. Did you see him?
A. Yes sir.
Q. After you set the cars out you pulled up on the main line and backed down to the rest of the train?
A. Yes sir.
Q. When you backed down to couple up where was the engines?
A. About that switch.
92 Q. Where was Mullins?
A. Back there coupling up.
Q. Do you know about how many cars back?
A. Four or five cars, maybe six.
Q. What were you doing in the engine?
A. Handling the engine.
Q. What direction were you looking?
A. Look back when I go backwards and forwards going forwards.
Q. Did you see the signal to back up after setting out the car?
A. Yes sir.
Q. How many did you see?
A. Saw both lamps.
Q. Both the flagman and brakeman was there?
A. Yes sir.
Q. After setting out the cars on the house track and breaking down and coupling up, what signal did the flagman and brakeman give, if any?
A. They gave the high-ball signal.
Q. Who gave the high-ball signal?
A. Both of them.
Q. Both lanterns?
A. Yes sir.
Q. Who held the lanterns?
A. Mullins and the brakeman.
Q. On which side of the track were they standing when they gave you the high-ball signal?
A. East side of the track.
Q. That is on the right side looking north on the main line?
A. Yes sir.

Q. Tell the jury what you mean by a high-ball signal?
A. It means leaving time.
Q. At the time you received the high-ball from Mullins where was the train?
A. The engines were about the house-track switch.
Q. What was the condition of the train when you received the high-ball signal?
A. It was standing still.
93 Q. Then the train was standing still when you received the high-ball signal from Mullins to pull out?
A. Yes sir.
Q. What did you do after receiving the high-ball?
A. We pulled out of town.
Q. Do you know about where that cattle guard is up there?
A. Yes sir.
Q. Are you familiar with the Y. & M. V. railroad tracks in Harriston?
A. Yes sir.
Q. What position did Mr. Mullins have with the railroad company?
A. Flagman.
Q. How long had he been flagman?
A. I don't know exactly, but for some time.
Q. He had been flagman for some time?
A. Yes sir.
Q. State whether or not you know Mr. Mullins flagged through Harriston for a year or two?
A. Yes sir, he had.
Q. What knowledge, if any, has a flagman of the tracks and switches and yar-s where he has to work?
A. He knows all about them.
Q. Did Mr. Mullins, as a flagman, know the condition of the yard in Harriston, Mississippi?
A. He did.
Q. Do you know the duties of a flagman?
A. Yes sir.
Q. Tell us some of them?
A. Protect the rear end of the train, see that the train is in good order, no hot boxes, attends to the switching, etc.
Q. Where does the engineer get his information as to what to do?
A. He is signalled by the flagman.
Q. What is the duty of the flagman when he gives the high-ball?
A. To get on the train.
Q. About how fast were you running when you passed the
94 cattle gap that night?
A. About 8 or 10 miles an hour.
Q. How fast when you passed the house track switch?
A. We were standing still there.
Q. The train was still there?
A. Yes sir.

Q. When Mr. Mullins gave the signal to leave how far was he from the engine?
A. 5 or 6 cars back.
Q. Was the brakeman with him?
A. Yes sir.
Q. Mr. Durkee, do you know of anything that you did on that particular night in the way of handling the train that was in any way negligent or likely to injure any one?

Objected to by counsel for plaintiff.
Objection overruled and plaintiff excepted.

Q. If you did in any way handle your engine in any way that would likely cause injury to anyone, please state it to the jury.
A. I handled it just like I have been doing for 15 years.
Q. Has Mr. Mullins ever flagged for you before?
A. Yes sir.
Q. How long before?
A. I don't remember, he has flagged several times with me.
Q. How many times has he flagged through Harriston for you?
A. A number of times, I cannot say how many.
Q. Did you know every person on that train that night?
A. I did not know the fireman's name, I would know him if I would see him?
A. A colored man?
A. Yes sir.
Q. Was any man on that train that night in any way negligent?

Objected to by counsel for plaintiff.
Objection sustained.

Q. I understood you to say when you received the high-ball signal your engine was about the house-track switch?
A. About there, yes sir.
95 Q. Did you know anything, when you pulled out of Harriston, of Mullins being hurt?
A. No sir.
Q. When did you first learn of it?
A. I think it was in Port Gibson at the Water tank.
Q. Do you know the condition of the tracks and grounds around the tracks about that house-track switch?
A. Yes sir.
Q. You are a railroad man?
A. Yes sir.
Q. Do you know when a railroad is in good condition?
A. I think I do.
Q. What was the condition around that switch?
A. All right, good condition.

Cross-examination.

By Mr. Reily:

Q. The track and road bed is in about the same condition as it was then?

A. Yes sir.

Q. In the operation of a train it is the duty of the engineer to pull out so that all the crew can get on?

A. Yes sir.

Q. Did you do that, that night?

A. I did.

Q. There were 34 cars on that train?

A. Yes sir.

Q. And a caboose?

A. Yes sir.

Q. In starting off, say after you have gone from here to the back side of this building, how fast would you be going.

A. About 4 miles I guess.

Q. On a level grade when you had gone twice that far how fast would you be traveling?

A. Little faster.

Q. How fast, in your judgment?

96 A. Possibly six or eight miles.

Q. After traveling say 200 feet about how fast?

A. Somewhere around 8 or 10 miles.

Q. At 300 feet how fast would it be going?

A. A little faster, it picks up as it goes.

Q. After traveling 400 feet how fast would it travel?

A. That would depend on the train and engine and the grade.

Q. Presuming that everything is in good shape and on a level grade?

A. By the time it traveled two blocks it would be going about 15 miles if everything was in good shape.

Q. How far would it have to travel before it reached full speed?

A. It takes two miles to reach full speed.

Q. If it was on a down grade it would gather speed faster?

A. Yes sir.

Q. You are familiar with the tracks in Harriston?

A. Yes sir.

Q. That grade just out of Harriston is down grade is it not?

A. Little grade for about half a mile.

Q. How long is a coach?

A. I cannot say.

Q. That night after you set the cars out on the house track you backed down to the other cars?

A. Yes sir.

Q. Was Mr. Mullins there?

A. Yes sir, he and the brakeman.

Q. How far back was the car?

A. Four or five cars back.

Q. When you backed into them of course you knocked them back some distance?

A. No sir, the air was on, you could not move them.

Q. Where did you next see Mullins?

A. On the east side of the track there in Harriston.

Q. That switch you spoke about is the one just south of the cattle guard?

A. Yes sir.

97 Q. With reference to that switch where was he?

A. South of it.

Q. How far south?

A. 5 or 6 cars.

Q. He helped couple up?

A. Yes sir.

Q. You were in the last engine?

A. I was in the second engine.

Q. Where was the second engine with reference to this switch?

A. Just a little south of the switch, the head engine was just about even with it.

Q. You say it is the duty of the flagman to mount the train after he gives the high-ball?

A. Yes sir.

Q. Don't they generally catch on to the caboose?

A. Yes sir, some time they catch the train and walk back.

Q. During the cold months they stay in the caboose?

A. As a general thing.

Q. It is true that a caboose is easier to catch than a coach?

A. No sir, did not say that.

Q. State whether or not a caboose is easier to catch than a coach?

A. I don't think so.

Q. You don't think a caboose with that long iron bar on it is easier to catch than a coach?

A. No sir.

Q. It is just as easy to catch a coach?

A. Yes sir, I think so.

Q. State whether or not they had a caboose on that train that night?

A. No sir, had a coach that night.

Q. How long is a box car?

A. Anywhere from 36 to 40 feet.

Q. What is the average, 40 feet?

A. About 38 feet.

Q. They are getting bigger all the time?

A. Yes sir.

98 Q. How long is an engine?

A. Never measured one.

Q. Just your judgment?

A. About 50 feet.

Q. Two would be a hundred?

A. Yes sir.

Q. How long is the tender?

A. About 20 feet.
Q. That would be forty for two?
A. Yes sir.
Q. 34 box cars 40 feet each would be 1340 feet?
A. Yes sir.
Q. How long is a caboose?
A. I cannot say?
Q. How long was this coach?
A. I cannot say.
Q. Give us your best judgment?
A. I never noticed one particularly.
Q. A coach is longer than a box car?
A. Yes sir.
Q. Cannot give the exact measurement?
A. No sir.

Redirect examination.

By Mr. Kennedy:

Q. What signal did Mr. Mullins give you?
A. The high-ball.
Q. Is there any signal he could have given you to ease out?
A. Yes sir.
Q. What is it?
A. The go-ahead signal.
Q. Have you ever seen Mr. Mullins ride on any part of the train except the caboose?
A. Many a time.
Q. Did you ever see him get on the cars and run backwards?
A. Yes sir.
Q. State whether or not that is easy for a railroad man?

99 Objected to by Counsel for Plaintiff.
Objection sustained.

Q. Is it one of the duties of a flagman?
A. Yes sir.
Q. What is the duty of a flagman if he sees the train is pulling out too fast for him to get on?
A. Flag her down.

Recross-examination.

By Mr. Reily:

Q. You said you looked ahead when going forward and back when going back?
A. Yes sir.
Q. If Mr. Mullins had given the signal and you were going forward and looking forward, would you have seen it?
A. It is second nature for a man to look back.
Q. If Mr. Mullins had flagged you down would you have seen it?
A. No sir, because when he gave the high-ball I pulled my window

to to keep out the sparks from the head engine. Mr. Gilmore kept the lookout and handled the air.

Q. It was the engineer's duty to pull out so everybody could get on?

A. Yes sir, that is the custom.

GEORGE HUNTER being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Kennedy:

Q. What is your name?
A. George Hunter.
Q. Where do you live?
A. Baton Rouge.
Q. Have you ever worked for the Y. & M. V.?
A. Yes sir.
Q. Do you remember the occasion when Mr. Mullins is said to have been hurt in Harriston?
A. I don't remember the date.
100 Q. Were you working with him the evening he was hurt?
A. Yes sir.
Q. What position were you holding at that time?
A. I was extra brakeman.
Q. What train were you on that night?
A. I don't remember the number, it was an extra going north.
Q. Were you on the same train which Mr. Durkey was an engineer?
A. Yes sir.
Q. Was Mr. Mullins on that train?
A. Yes sir.
Q. What was his position?
A. He was flagman.
Q. Who was conductor?
A. Mr. Author Stevens.
Q. Who was on the front engine?
A. Mr. Gilmore.
Q. Where was that train made up?
A. Wilson, Louisiana.
Q. Where was it going?
A. Vicksburg, Mississippi.
Q. Are you working for the Y. & M. V. now?
A. No sir.
Q. That night, after fifteen had gone by, did you do any switching north of the passenger depot?
A. Yes sir, we did some switching.
Q. Who attended to the switching?
A. Me and Mr. Mullins.
Q. How many cars did you set out?
A. One car.

Q. Where did you set it out?
A. On the house track.
Q. Where is the house track?
A. North of the depot in Harriston.
Q. Who uncoupled the cars?
A. Me.
Q. Who gave the signals?
101 A. Me and Mr. Mullins both.
Q. You both gave the signals?
A. Yes sir.
Q. Which car did you set out?
A. Fourth car from the head end.
Q. There were three cars between it and the engine?
A. Yes sir.
Q. After setting the cars out what did Mr. Mullins do?
A. He closed the derail and I attended to the switch.
Q. What is the derail?
A. Something on the track to keep cars from running off the side track.
Q. Which side of the track were you and Mr. Mullins on then?
A. East of main line.
Q. Who made the coupling before you pulled out?
A. I made the coupling and he was standing there.
Q. You were the brakeman?
A. Yes sir.
Q. After coupling up the train where was it standing?
A. On the main line.
Q. Headed which way?
A. Headed towards Vicksburg.
Q. State whether or not you were through work there?
A. Yes sir.
Q. Who gave the high ball?
A. Me and Mr. Mullins both.
Q. Who did you signal?
A. The engineer.
Q. What did that signal mean?
A. It meant we was ready to go away from there.
Q. What direction were you and Mr. Mullins from the house track switch when you gave the high ball signal?
A. About three cars below the switch when we gave the highball.
Q. There were three cars between you and Mr. Mullins and the engine or the house track switch?
A. Yes sir.
Q. Did you talk to Mr. Mullins there?
102 A. Yes sir, the last thing he said to me was "George, set out car 4 at Port Gibson."
Q. What did you do then?
A. I bled off the three cars.
Q. What do you mean by bleeding off cars?
A. Loose the air to keep the brakes from sticking, the air gets too tight and makes the brakes stick.

Q. There were only three cars in which the air was too tight?
A. Yes sir.
Q. Had the train started off when you started bleeding the cars?
A. Yes sir.
Q. Where did you start bleeding the cars?
A. Third from the engine.
Q. Did you run along side the cars and bleed them?
A. Yes sir.
Q. Where did you catch the train?
A. On the second engine.
Q. What did you do then?
A. Went over on the fireman's side and set down.
Q. How long did you stay there?
A. Until we got to Port Gibson.
Q. When did you hear about Mr. Mullins?
A. At Port Gibson.
Q. Have — worked long as a brakeman?
A. Yes sir.
Q. Do you know the condition of the railroad tracks and yards in Harriston?
A. Yes sir.
Q. Do you know where this switch and cattle gap is?
A. Yes sir.
Q. What is their condition?
A. They were all right when I got on.
Q. Did you have any trouble catching the train?
A. No sir.
Q. How close were you to the cattle gap when you caught the train?
103 A. I was right at it, I jumped on to keep from running into it.

Cross-examination.

By Mr. Reily:

Q. About how far from the cattle gap were you when you mounted the train?
A. About as far as that gentleman there.
Q. You were that close to it?
A. Yes sir.
Q. You mounted the second engine?
A. Yes sir.
Q. The last you saw Mr. Mullins he was on the east side of the track?
A. Yes sir.
Q. State whether or not there was a caboose on that train?
A. No sir.
Q. Are you working for the company now?
A. No sir.
Q. What is the matter?

A. I got fired, that is, work give out and I am working for another company.
Q. Are you working for another railroad company?
A. Yes sir.
Q. What company are you working for?
A. The L. R. & N. Company.
Q. Did you make a statement of this to Mr. Doyle?
A. No sir, did not know him until I come here.
Q. Did you make a statement to any one?
A. Yes sir, the train master at Wilson.
Q. Did you make a written statement?
A. I told him how it was and he wrote it down.
Q. Did you sign it?
A. No sir.
Q. You did not sign it?
A. Not that I know of.
Q. You tell the jury that you did not sign the statement you give the railroad?
104 A. I won't be sure.
Q. Do you know whether or not you signed it?
A. I don't remember.
Q. You tell them now you don't know whether or not you signed it?
A. I don't remember.

Mr. Hugh Gilmore being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Kennedy:

Q. What is your business?
A. Engineer.
Q. Where do you live?
A. Right here in Natchez.
Q. Are you a married man?
A. Yes sir.
Q. Are you a Mississippian?
A. Yes sir.
Q. How long have you been working for the railroad?
A. Going on 10 years.
Q. Did you run an engine of the Y. & M. V.?
A. Yes sir.
Q. Who were you employed by when it is said that Davis Mullins was hurt by a train?
A. The Y. & M. V.
Q. Where were you that night?
A. I was leaving from Harriston going to Vicksburg.
Q. That night?
A. Yes sir.
Q. Were you pulling an engine on that train?

A. Yes sir.
Q. What engine did you have charge of?
A. 426 I believe.
105 Q. What engine did you have on that train?
A. I had the lead engine.
Q. Where was that train made up?
A. Wilson.
Q. Where was it going?
A. Vicksburg.
Q. What kind of train was it?
A. Freight train.
Q. Tell the jury who was on that train that night?
A. Some of them were new, I did not know them all.
Q. Who was the conductor?
A. Author Stevens was conductor, Mr. Mullins was flagman, George Hunter was brakeman, and Mr. Durkee was on the second engine, I don't remember the firemen.
Q. Was there any other person on that train?
A. Not that I know of.
Q. Any other employee?
A. No sir.
Q. In what direction were you going?
A. North.
Q. When you pulled into Harriston where did you first stop?
A. On the south passing track.
Q. Why did you pull into the south passing track?
A. Let 15 by.
Q. What was that?
A. A passenger train.
Q. What did you do after 15 went by?
A. Pulled up and coaled and watered and set out some cars.
Q. Where did you set out the cars?
A. Set out a car on the house track.
Q. The house track is on the west side of the main line, north of the passenger depot?
A. Yes sir.
Q. Which car on the train did you set out?
A. I think it was the second or third from the engine.
Q. Where did you stop your engine to set out the car on the house track?
106 A. Clear of the house track switch.
Q. Where was Mr. Mullins and George Hunter then?
A. I don't know which was which, one was at the switch and the other at the derail, I could only see the lights.
Q. You saw one light at the switch and the other at the derail—could you tell one from the other?
A. No sir, could only see the lights.
Q. After you set out the car on the house track what did you do?
A. Backed down and coupled up.
Q. You went back and coupled to the rest of the cars?
A. Yes sir.

Q. Who gave the signal to back up?
A. I saw both lights, the flagman and brakeman.
Q. Who was the flagman?
A. Mullins.
Q. The train was coupled up?
—. ——.
Q. On what line was the train standing after you backed down and coupled up after setting out the car on the house track?
A. Main line.
Q. Was there any more work to do?
A. No sir.
Q. Where was your engine standing then?
A. A car length or two south of the house track switch.
Q. Your engine was south of the house track switch.
A. Yes sir.
Q. What signal did you receive then?
A. Proceed.
Q. What is it called?
A. The high-ball.
Q. Who gave that signal?
A. Both lamps, brakeman and Mr. Mullins.
Q. What did you do then?
A. Left Harriston.
Q. What did you do then?
A. Carried the train on to Vicksburg.
Q. Do you know a flagman's duty?
107 A. Yes sir.
Q. What is his duty?
A. Protect the rear end of the train, and whatever else that is necessary.
Q. After he gives the high ball what is his duty?
A. Get on the train.
Q. When a flagman gives the high ball signal he is supposed to get on the train?
A. Yes sir.
Q. Did you leave Harriston at such a rate of speed that Mr. Mullins could not get on the train with safety?

Objected to by counsel for plaintiff.
Objection sustained.

Q. Your train was standing still when you received the high ball?
A. Yes sir.
Q. Was it, or not, Mr. Mullins' duty to get on the train?
A. I think it was.
Q. About how fast were you pulling out when you passed the cattle guard?
A. About 6 or 8 or 10 miles.
Q. What is the flagman's duty if the train is pulling out too fast for him to get on?
A. Flag it down.
Q. Did he flag it down at that time?

A. No sir.
Q. If he had would you have seen him?
A. I think so.
Q. You say he did not flag it down?
A. I did not see him.
Q. If the flagman wanted you to pull out slow did he have a slow signal?
A. Yes sir.
Q. Did he give you that signal?
A. No sir.
Q. State whether or not it is the duty of the flagman to know the condition of the yards and tracks he has to work over?
108 A. Yes sir.
Q. Had Mr. Mullins ever flagged before?
A. He had flagged on trains I had pulled.
Q. Do you know whether or not he had ever flagged through Harriston before?
A. Yes sir.
Q. How long?
A. 8 or 9 months anyway.
Q. State whether or not you know if Mr. Mullins was familiar with the yards and tracks at Harriston, Mississippi?
A. Yes sir, bound to have been.
Q. Do you know the condition of the track and the grounds at the side of the track around the house track switch up to the cattle guard and back to the freight depot in Harriston?
A. Yes sir.
Q. It has been testified that there is loose gravel all along side of the tracks there, state what that is for?
A. That is used as a ballast for the track.
Q. Does the fact that this gravel is along side of the track interfere with the conductor or flagman in the performance of his duties?

Objected to by counsel for plaintiff.
Objection sustained and defendant excepted.

Q. You say you had charge of the head engine?
A. Yes sir.
Q. Do you know of anything that you left undone with reference to your duties that might have been dangerous to any person on that train?

Objected to by counsel for plaintiff.
Objection sustained and defendant excepted.

Q. Mr. Gilmore, do you know of any act by any of the employees of the railroad on that train that was in any way improper or dangerous, if so state to the jury?

Objected to by counsel for plaintiff.
Objection sustained and defendant excepted.

Cross-examination.

109 By Mr. Reily:

Q. After setting the car out on the house track and backing down you were on the main line?

A. Yes sir.

Q. You said the head engine which you were pulling was about a car's length south of the house track switch?

A. Yes sir.

Q. After you received the signal to proceed you did not look back any more?

A. Yes sir.

Q. You remember looking back?

A. Yes sir, I looked to see if I had all my train.

Q. Do you look back every time?

A. Yes sir.

Q. When the train was coupled up how far south of the switch was your engine?

A. About two car lengths.

Q. Do you know who coupled the train?

A. No sir, I could not see them.

Q. It was night?

A. Yes sir.

Q. Dark?

A. Yes sir.

Q. You could not see who anybody was?

A. No sir, only see the lights.

Q. How many lights did you see?

A. Two.

Q. How far apart?

A. They looked like they might have been a car or two apart.

Q. How far back from the engine?

A. Might have been three or four cars.

Q. Who gave the high ball signal?

A. Both lamps.

Q. When did you see Mr. Mullins next?

A. Here in Natchez.

Q. After he was hurt?

A. Yes sir.

110 Q. How long after he was hurt?

A. He was dead when I saw him.

Q. The next time you saw him he was dead?

A. Yes sir.

Q. The last time you saw him alive was when he gave you the signal to pull out?

A. Yes sir.

Q. You never looked back?

A. Yes sir, second nature.

Q. When did you look back?

A. After having gone 25 or 30 car lengths.

Q. North of the cattle gap?

A. Yes sir.
Q. You looked to see if you had all the crew?
A. I looked to see if I had my tail lights.
Q. Is that one of the duties of an engineer?
A. Yes sir.
Q. You look back every time to see if you have your tail lights?
A. Yes sir, want to see if I have all my train.
Q. How long have you been an engineer?
A. 5 or 6 years.
Q. If everything is in good running order, the track level, the train and engine in perfect order and the track, and with 34 cars like you had that night, how fast would you be travelling by the time you had gone as far as the back of this building?

Objected to what would have been done under such circumstances unless the evidence shows——
Objection overruled and defendant excepted.

Q. How fast would you be going?
A. With 34 cars you could not pull out very fast.
Q. About how fast?
A. About 4 or 5 miles.
Q. By the time you had traveled half a block, how fast would you be going?

Objected to by counsel for defendant.
111 Objection overruled and defendant excepted.

Q. With that train you had that night how fast would you be traveling?
A. Not very fast with that train.
Q. About how fast?
A. 6 or 8 miles.
Q. In 200 feet how fast would you go?
A. The further you go the fast- you get.
Q. How fast?
A. About 10 or 12 miles in 200 feet.
Q. How fast would that train be going in 300 feet?
A. About 15 miles.
Q. What time did you leave Wilson that night?
A. I don't know exactly.
Q. After getting headway, how fast was your train traveling that night?
A. That would depend on the grade.
Q. On a level grade?
A. About 25 miles an hour.
Q. You could travel 25 miles an hour?
A. Yes sir.
Q. You say you could make 15 miles in 300 yards?
A. About that.
Q. By the time you had gone four or five hundred feet you had gained about all your speed, had you not?
A. In 500 or 600 feet, I expect so.

Q. Do you know the condition of the ground around those tracks?
A. Yes sir.
Q. You say there is gravel there?
A. Yes sir, a gravel ballast.
Q. Have you ever walked over that gravel around that switch?
A. Yes sir.
Q. It is loose and hard to walk over?
A. No sir, I don't think so.
Q. It is full of washes?
A. No sir
Q. You deny that?
112 A. Yes sir.
Q. Have you ever walked up as far as the cattle gap?
A. No sir.
Q. You don't know that there is a lot of loose rocks there?
A. No sir
Q. When you received the high ball signal you pulled straight out?
A. Yes sir.
Q. That the way you generally do?
A. Yes sir.
Q. There is a down grade running out of Harriston?
A. A little grade for a short space.
Q. It is down grade until around the bend, is it not?
A. Grade steps just above the cattle gap.
Q. Ain't it a fact that it is down grade from the freight depot to 100 yards on the other side *or* the cattle gap?
A. No sir, not one hundred yards on the other side of the cattle gap.
Q. Some of those cars had to be bled?
A. Yes sir.
Q. Do you know who bled the cars?
A. No sir.
Q. Do you know whether or not Mr. Mullins did that?
A. No sir.

Redirect examination.

By Mr. Kennedy:

Q. Do you know that there were only two cars bled?
A. I don't know.
Q. I understood you to say that when your train was going through the cattle guard it was making about 6 or 8 miles per hour?
A. I guess about that.
113 Q. Your brakes were sticking?
A. Yes sir, they were a little tight.
Q. What is the cause of that?
A. A little too much air gets into the cylinders and takes it a little longer to loose.
Q. Is that caused by anything being out of order?

A. No sir.
Q. Is that a sign of the air being out of order?
A. No sir, when the air gets out of order the train stops right now.
Q. Where did you first hear of Mr. Mullins being hurt?
A. On the other side of Bayou Pierre.

Recross-examination.

By Mr. Reily:

Q. Why were the cars bled?
A. I don't know why he bled them, no one told him to, I can handle all of that from my engine.
Q. Why are those bleeding handles on each car, then?
A. So they can be bled if necessary, but that can be done from the engine.
Q. You don't know how many cars were bled?
A. No sir.
Q. Nor who bled them?
A. No sir.
Q. Did you make a statement of this to the railroad company?
A. Some time afterwards in Wilson.
Q. Who to?
A. The trainmaster.
Q. You made a statement to the company?
A. Yes sir.

Mr. AUTHOR STEVENS being called on behalf of the defendant and being duly sworn, testified as follows:

Direct examination.

By Mr. Kennedy:

114 Q. What is your name?
A. Author Stevens.
Q. Where do you live?
A. Wilson, Louisiana.
Q. What business are you engaged in?
A. I am a railroad conductor.
Q. For what company?
A. Y. & M. V.
Q. How long have you been working for them?
A. 11 years.
Q. Were you employed on the freight train running from Wilson, Louisiana, to Vicksburg, Mississippi, on October 14, 1915, the one on which Mr. James Davis Mullins was flagman?
A. I was.
Q. Were you conductor on that train?
A. I was.
Q. Who was the brakeman?
A. George Hunter.
Q. Who was the flagman?

A. Mr. Mullins.
Q. How many engines did you have?
A. Two.
Q. Who were the engineers?
A. Mr. Gilmore and Mr. Durkee.
Q. Who were the firemen?
A. Really I don't know.
Q. Were there any other persons on that train that night?
A. No sir.
Q. Who had charge of that train?
A. I did.
Q. What direction were you running?
A. North.
Q. Where did you go when you first come into Harriston?
A. We went in on the siding to let 15 by.
Q. Where did you go then?
A. We went up to the chute and took coal and water and then set out two or three cars on the transfer and then went up and set
115 out a car on the house track.
Q. Where were you when the cars were set out on the house track?
A. About fifteen cars from the engine.
Q. On which side of the track were you?
A. I was on the west or left side of the train.
Q. What employee looked after the switching of the cars?
A. Mr. Mullins and George Hunter.
Q. Did you see George Hunter that night?
A. Yes sir.
Q. Did you see him when he set out the car?
A. No sir.
Q. Where were you when the train was high balled?
A. About 15 cars from the engine.
Q. Were you on the train?
A. No sir, on the ground.
Q. State whether or not you gave the order to high ball?
A. I told Mr. Mullins when he set out that car on the house track we were ready to proceed.
Q. You did not see the signal yourself?
A. No sir.
Q. You knew they were ready to proceed?
A. Yes sir, I told him so.
Q. Where did you catch the train?
A. On to the front end of the coach?
Q. How far were you from the freight depot when you caught the train?
A. I was about a hundred feet I suppose.
Q. Above the freight depot, towards the house track switch?
A. Yes sir, north of the freight depot.
Q. How did you catch the train?
A. Caught the front end of the coach as it went by.
Q. On which side of the track?

A. West side or left side.
Q. What did you do?
A. I crossed over to the east side of the car and looked up the track and did not see a light, then crossed back to the
116 west side and did not see the light, and then went back over to the east side and stood on the steps until we had passed where I thought he ought to be standing to catch the train.
Q. You saw nothing of Mr. Mullins?
A. No sir.
Q. He did not catch on to the coach?
A. No sir.
Q. Did he try to catch on to the coach?
A. No sir.
Q. State whether or not it is the custom of the employees, or Mr. Mullins, to always ride in the caboose?
A. No sir, not all the time, sometimes they catch along the middle of the train and ride to the next station and sometimes they get in the engine and ride to the next station.
Q. At times they ride from one station to another in that way?
A. Yes sir, the flagman often does that when he knows the conductor is in the rear of the train.
Q. Who was your brakeman that night?
A. George Hunter.
Q. Did he ride in the caboose?
A. No sir.
Q. Where was he riding?
A. Somewhere up in front.
Q. You were always in the caboose?
A. Yes sir, I ride in the caboose.
Q. Where did you first hear of Mr. Mullins being hurt?
A. At Port Gibson I received a message that Mr. Mullins was hurt in Harriston.
Q. Was that the first you heard of it?
A. Yes sir.
Q. You say you were in charge of that train that night?
A. Yes sir.
Q. Mr. Stevens, did you as conductor having charge of that train, commit any act or do anything that would tend in any way to produce injury, or liable to produce injury, to any of the employees on that train?
117 A. No sir, I did not.
Q. Do you know if any other employee on that train was in any way negligent?
A. There was not.
Q. You say you live in Wilson, Louisiana?
A. Yes sir.
Q. Are you a mraried man?
A. Yes sir.
Q. Have you a family?
A. Yes sir.

Q. How long have you been working for the Y. & M. V?
A. 11 years.
Q. Did you know Mr. Mullins before this?
A. I knew him when he first come in.
Q. Where was that?
A. On a work train of the Y. & M. V. at Gloster.
Q. Do you know the condition of the switches and yards over which you run?
A. Yes sir, I know every switch and track from New Orleans to Vicksburg.
Q. State whether or not it is the flagman's duty to know the switches and tracks?
A. Yes sir, he had to know them before the examination.
Q. Did Mr. Mullins know the switches and tracks in Harriston?
A. He must have, he worked there several times with me.
Q. Do you know the condition of the track and ground around the track of the main line north of the depot in Harriston?
A. Yes sir.
Q. What is its condition?
A. It is a level track with a gravel ballast, and in good condition.
Q. Have you ever had an occasion to catch a train along there?
A. Every time I go through there.
Q. State whether or not the track is so constructed there that it is inconvenient or dangerous to catch a train there?
A. Not in the least.

Q. Had Mr. Mullins as flagman been in the habit and
118 custom of catching trains there?

A. Yes sir, he had. He would sometimes catch on to the caboose and sometimes catch the cars and walk back over them.
Q. State whether or not that is a difficult thing to do?
A. Well, they do it all the time.
Q. State whether or not that is one of the duties of the employees?
A. Yes sir, it is the duty to see that the train stays in good shape and in doing so they walk over it.
Q. Mr. Mullins knew that?
A. Yes sir.
Q. Did he do that?
A. That night I don't know.
Q. Previous to that time have you ever seen him walk over a train?
A. Yes sir.
Q. About how fast was the train going when you caught it?
A. I guess about five miles an hour.
Q. Have you had much experience in catching moving trains?
A. 11 years of it.
Q. Did you have any trouble catching the train that night?
A. None in the least.

Cross-examination.

By Mr. Reily:

Q. The train was going about 5 miles an hour when you caught it?

A. Yes sir.
Q. How far north of the freight depot was that?
A. About 150 feet I guess.
Q. On the left or right side of the track?
A. Left side facing Vicksburg.
Q. Different side from which Mr. Mullins is supposed to have tried to get on?
A. He was on the right side.
Q. When you got on you went across and looked up the track?
A. Yes sir.
119 Q. You never saw any light on that side at all?
A. No sir.
Q. You are positive of that?
A. Yes sir.
Q. They had pulled out then?
A. Yes sir.
Q. Where was the engine at that time?
A. It had not reached the passing switch.
Q. Had it passed the house-track switch?
A. Yes sir.
Q. Between that and the cattle gap?
A. I cannot say exactly where it was, we had run about 15 or 20 car lengths when I looked out on the other side.
Q. Do you know where the engine was when you mounted the train?
A. No sir, it must have been 10 or 12 car lengths above the house-track switch.
Q. You never saw any light at all?
A. No sir.
Q. Did you go into the caboose when you got on the train?
A. Not before looking up the track.
Q. Just got on the train and walked across to the other side?
A. Yes sir.
Q. Got on the train and walked right on across?
A. No sir, I wasn't in any hurry, just walked across.
Q. I understood you to say that the track along there from the freight depot to the cattle gap was even?
A. Level track, yes sir.
Q. Don't you know that there is so many loose rocks there that you can scarcely walk over it at all?
A. No sir, I have never experienced any trouble like that.
Q. You were the conductor on that train?
A. Yes sir.
Q. You are still in the employment of the railroad?
A. Yes sir.
Q. Did you give a written statement to the railroad about this?
A. Yes sir.
120 Q. You had charge of that train?
A. Yes sir.
Q. You are the one that is responsible for the operation of it?
A. Yes sir.

Q. You are still with the company?
A. Yes sir.

CHARLEY COLLINS being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Kennedy:

Q. What is your name?
A. Charley Collins.
Q. Where do you live?
A. Jackson, Mississippi.
Q. What is your business?
A. Fireman.
Q. For what company?
A. Y. & M. V.
Q. How long have you been fireman?
A. About four years.
Q. Were you fireman on the train in Harriston at the time it was said Mr. Mullins was hurt?
A. Yes sir.
Q. What position did Mr. Mullins have?
A. Flagman.
Q. You were fireman?
A. Yes sir.
Q. On which engine?
A. Head engine that night.
Q. Who was your engineer?
A. Mr. Gilmore.
Q. Where did you all come from?
A. Wilson, Louisiana.
Q. Where were you going?
A. Vicksburg, Mississippi.
121 Q. In what direction?
A. North.
Q. When you come to Harriston where did you first go?
A. On the siding to let 15 by.
Q. What is 15.
A. Passenger train.
Q. Did you let it by?
A. Yes sir.
Q. What did you do then?
A. Pulled up to the transfer track and house track and set out some cars.
Q. After you set all the cars out what did you do?
A. We backed down, coupled up and was ready to go.
Q. Did anybody give you the high ball?
A. Did not see it.
Q. Did you pull out?
A. Yes sir.

Q. You were on the front engine?
A. Yes sir.
Q. Where was your engine standing when you were just ready to pull out?
A. Just about the end of the house-track switch.
Q. You started from there to Vicksburg?
A. Yes sir.
Q. Was that north of the freight depot?
A. Yes sir.
Q. About how fast was the train going when you passed through the cattle gap?
A. About 8 or 9 miles an hour.
Q. Do you know the condition of the yards there in Harriston.
A. No sir, I don't know.
Q. You are the fireman?
A. Yes sir.
Q. Where did you first hear of Mr. Mullins being hurt?
A. Port Gibson.

Cross-examination.

122 By Mr. Reily:

Q. You knew nothing about Mr. Mullins being hurt until you got to Port Gibson?
A. No sir.
Q. You did not particularly notice how fast you were running when you passed that cattle gap?
A. No sir.
Q. Nobody told you to watch out and see how fast you were running?
A. No sir.
Q. Did not know about this thing until you got to Port Gibson?
A. No sir.
Q. Are you still with the company?
A. Yes sir.
Q. Did you give them a signed statement of these facts?
A. Yes sir.

Mr. J. W. BUCHAM being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Kennedy:

Q. Where do you live?
A. Memphis.
Q. What is your business?
A. Fireman.
Q. How long have you been working for the Y. & M. V.?
A. 4 years in March.
Q. How long have you been in the railroad business?

A. Four years.

Q. Were you employed on the train which left Wilson, La., and was going to Vicksburg, Miss., and passed through Harriston on which Mr. Mullins was flagman?

A. Yes sir.

Q. Do you remember the occasion when it is said he got hurt in Harriston?

A. I did not know about it until I got to Port Gibson, I believe that is the next station.

123 Q. What position did you hold on that train?

A. I was fireman.

Q. Which engine?

A. Back engine for Mr. Durkee.

Q. Who was your engineer?

A. Mr. Durkee.

Q. Do you remember where your train pulled in when it came into Harriston?

A. Yes sir.

Q. Where?

A. South end of the passing track.

Q. Why pull in there?

A. Let No. 15 by.

Q. What then?

A. Pulled up, took on water and set out a car on the house track I believe.

Q. Where is the house track?

A. I am not sure about the yards there.

Q. Are you familiar with that part of the track?

A. No sir, that was my first trip through there.

Q. That was during the night?

A. Yes sir.

Q. You were fireman?

A. Yes sir.

Q. Do you remember where the engine was standing after setting out the car on the house track and coupling up?

A. No sir, I cannot say.

Q. You took no notice of it?

A. No sir.

Q. Do you know how fast the train was going when it passed through the cattle gap two or three hundred feet above there?

A. We would be going about 8 miles an hour.

Q. Are you familiar with the condition of the yards there?

A. No sir.

Q. Do you know whether or not it is the duty of the flagman to know the yards?

124 A. Yes sir.

Cross-examination.

By Mr. Reily:

Q. You say you are not familiar with the yards there?

A. No sir.

Q. You were in the engine?
A. Yes sir.
Q. Did you have a head light on the engine?
A. Yes sir.
Q. That will throw a light a hundred feet?
A. Some will and some won't.
Q. You don't know the condition of the track there?
A. No sir.
Q. Was Mr. Mullins working on that train?
A. Yes sir.
Q. Did you see him there?
A. Yes sir, asked him if he wanted any lunch and he did not, but think he afterwards took lunch with Mr. Durkee.
Q. It was dark in the yards at Harriston?
A. Yes sir.
Q. Do you know about where that switch is just south of the cattle guard?
A. No sir.
Q. Do you know where that cattle guard is?
A. I know about where it is.
Q. Was there any light up that way?
A. None that I remember of.
Q. That is part of the yards?
A. I cannot say, I don't know the conditions there.
Q. There was no light within two hundred feet of that point?
A. I don't know.
Q. Do you remember seeing one?
A. I don't remember it, I don't know.
Q. That was in the yard at Harriston where you all were switching?
A. Yes sir.
125 Q. That was 3 o'clock in the morning?
A. Between three and four.
Q. Was there a moon?
A. I cannot say.
Q. Was it a dark night?
A. It was dark, I don't know how dark.
Q. You don't know whether or not there is a lot of loose rocks side of the track there?
A. No sir, I don't know.
Q. Where did you first hear of the accident?
A. At the first telegraph station above Harriston.
Q. There has been a good deal said about the rate the train was going through that cattle gap, was there anything to impress that on your mind?
A. No sir.
Q. You just presume they were going about that fast?
A. About 8 miles per hour.
Q. That is just judging from your knowledge as to how fast a train starts off?
A. Yes sir.

Q. Did you make a written statement and give it to the company?
A. Yes sir.
Q. When did you make the statement?
A. Shortly after it occurred.
Q. Are you still with the company?
A. Yes sir.

Mr. J. M. HARPER being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Kennedy:

Q. Where do you live?
A. Harriston, Mississippi.
Q. Do you live out at a place it is said Mr. Mullins was hurt?
A. Yes sir.
Q. How long have you lived there?
126 A. About 12 years.
Q. Have you a family?
A. Yes sir.
Q. What is your business?
A. Supervisor of the tracks.
Q. For what company?
A. Y. & M. V.
Q. What tracks have you?
A. Between mile post 218 at Vicksburg and 317 at Dayton.
Q. 99 miles?
A. Yes sir.
Q. Does the track through Harriston come under your supervision?
A. Yes sir.
Q. Do you know where the house track is?
A. Yes sir.
Q. Do you know where the passing track is?
A. Yes sir.
Q. What is the condition of these tracks and road bed?
A. Good condition.
Q. What was their condition *in* October 14, 1915?
A. Good condition.
Q. It has been testified here that there is some gravel between the main line and passing track north of the freight depot there in Harriston, tell the jury about it.
A. Yes sir, there is gravel and cinders between the two tracks.
Q. Does it make the ground uneven and hard to walk over in catching a train?
A. No sir.
Q. Does it in any way interfere with the discharging of any one's duties?
A. No sir.
Q. How much experience have you had with tracks?

A. 26 years.
Q. What roads have you worked for?
A. Y. & M. V.
Q. Do you know Pole Gibson?
127 A. Yes sir.
Q. Did Pole Gibson point out to you where he said he found Mr. Mullins' body?
A. Yes sir.
Q. Were you on the ground when he pointed it out to you?
A. Yes sir.
Q. Tell the jury on which side of the main line it was?
A. On the east side of the main line.
Q. The right side going north?
A. Yes sir.
Q. What direction from the cattle gap was the body found?
A. South of the cattle gap.
Q. How far south of the cattle gap?
A. 30 feet.
Q. Did you measure it?
A. Yes sir.
Q. When did you see this ground there last?
A. I saw it last Saturday and Sunday, but was on the ground there on the 22d of March.
Q. Were there any large rocks there?
A. No sir.
Q. What is the condition there?
A. There is level gravel and cinders there, ranging from that size down.
Q. State the size so it can go in the record?
A. From about one-half inch in diameter down.
Q. Tell the jury how that gravel is put there?
A. The gravel slopes back from the top of the ties on the main line to the bottom of the ties on the passing track, a distance of 14 feet and 6 inches.
Q. State whether or not that is the standard method for gravelling tracks?
A. Yes sir, it is.
Q. Were you present when those tracks were photographed?
A. Yes sir.
Q. Who was there?
A. Mr. Doyle and a gentleman from Vicksburg and Pole Gibson.
128 Q. Did Pole Gibson point the spot to the photographer where Mr. Mullins' body was found?
A. Yes sir.

Cross examination.

By Mr. Reily:

Q. You say you have been with the company for 26 years?
A. Yes sir.

Q. You are supervisor of the tracks?
A. Yes sir.
Q. Where from?
A. Mile post 218 north of Vicksburg to post 317 at Dayton.
Q. 99 miles?
A. Yes sir.
Q. You look after that 99 miles?
A. Yes sir.
Q. How often do you report?
A. How do you mean?
Q. Don't you report each month to the railroad?
A. Not on the condition of the tracks.
Q. You don't have any reports to make?
A. Only 47 each month.
Q. What kind of reports?
A. Well there is the material report, riding engine, inspecting switches, and so on.
Q. There are 47 of them a month?
A. Yes sir.
Q. Reports of your various duties?
A. Yes sir.
Q. It is your duty to report the condition of the switches?
A. Yes sir, once a month. I have to inspect them.
Q. Is it your duty to keep the track in good shape?
A. Yes sir.
Q. If the track were to get out of shape in Harriston you would be responsible?
A. Yes sir.

Q. If this boy was injured because of the track being in
129 bad condition you would be responsible?
A. No sir, I might be censured but not blamed.

Q. It is your duty to keep the track in good shape in Harriston?
A. Yes sir, and I did.
Q. And if this man was injured on account of the condition of the track you would not be responsible?
A. No sir, I would probably be censured if that were the case.

Redirect examination.

By Mr. Kennedy:

Q. You saw the condition of that track where this man's body was found?
A. Yes sir.
Q. Was there anything wrong with that track?
A. No sir.
Q. Was it out of order in any way?
A. No sir.
Q. What was its condition?
A. Good condition.
Q. How many years' experience have you had?
A. 26 years.

Recross-examination.

By Mr. Reily:

Q. In inspecting the tracks you ride in an engine, do you not?
A. Sometimes in an engine and sometimes in the train.
Q. You don't walk over the ground?
A. Yes sir.
Q. You don't walk over that hundred miles of track?
A. In a year's time I walk over every foot of it.
Q. You mean to tell me you walk over a hundred miles of track?
A. Yes sir, within a year.

Mr. J. R. WADE being called on behalf of the defendant and being duly sworn, testified as follows:

Direct examination.

130 By Mr. Kennedy:

Q. Where do you live?
A. Lorman, Mississippi.
Q. In what county?
A. Jefferson County.
Q. How long have you lived in Jefferson County?
A. All my life, 30 odd years.
Q. Are you an employee of the railroad company?
A. No sir.
Q. Have you ever been?
A. No sir.
Q. What is your business?
A. I am county surveyor of Jefferson County.
Q. How long have you been county surveyor?
A. Have held one term and am going into the second, about 4½ years.
Q. How long have you been in the surveying business?
A. About 15 years.
Q. State whether or not you, as a surveyor, did not survey the town of Harriston to ascertain its corporate limits?

Objected to by counsel for plaintiff.

Questions.

By Mr. Reily:

Q. When was the last time you adjusted your instruments with a true meridian?
A. About six months ago.
Q. Previous to the surveying of the town of Harriston?
A. Yes sir.
Q. Before this survey?
A. Yes sir.

Q. Six months previous to that?
A. Yes sir, I want to say here that Jefferson County has no established meridian, but I adjusted my instrument with an old meridian that has been used a long time for that purpose.
Q. Did you establish that line of meridian?
A. No sir.
131 Q. Who established it?
A. My father.
Q. That is a line of your father's making?
A. Yes sir.
Q. Do you know whether that is a line of true meridian?
A. Yes sir.
Q. You adjust your instrument with that meridian?
A. Yes sir.
Q. How long before this survey?
A. About 6 months.
Q. Before that time how long since had you adjusted it?
A. About 6 months.
Q. With this same line of meridian?
A. I had it adjusted by the manufacturer, sometimes, I don't remember just when.
Q. Sometimes have it adjusted by the manufacturer?
A. Yes sir.
Q. How long since that was done?
A. About a year ago.
Q. When was six months ago?
A. About last September.
Q. Previous to that?
A. It would be about last June or April of last year.
Q. That was according to your father's line?
A. Yes sir.
Q. Just before that?
A. I had it adjusted by the manufacturer then.

Objected to by the counsel for plaintiff under the statute.
Objection overruled and plaintiff excepted.

Examination (continued).

By Mr. Kennedy:

Q. Is this line you adjusted your instrument — one that has been long used in Jefferson County.

Objected to by counsel for plaintiff.
Objection sustained.

132 Q. Were you called upon as a surveyor to survey the town of Harriston in Jefferson County as to where the corporate limits cross the railroad track north of Harriston?

Objected to by counsel for plaintiff.
Objection sustained.

Q. Did you run the north line of the corporate limits of the town of Harriston?

Objected to by counsel for plaintiff.
Objection overruled and plaintiff excepted.

A. Yes sir, I surveyed the north line, where it crosses the track.
Q. What portion did you run?
A. Just that portion that crossed the main line of the Y. & M. V.
Q. Did you make a plat of where the line crosses the Y. & M. V.?

Objected to by counsel for plaintiff.
Objection overruled and plaintiff excepted.

A. Yes sir.
Q. Please refer to that plat or map—first I will ask you where did you get your description as to the limits of the town of Harriston?
A. From a map made by H. J. Fairly as set down in record book R. R. page- 118 and 119 of the records of Jefferson County.
Q. Do you know where the main street in Harriston crosses the Y. & M. V. Railroad?
A. Yes sir.
Q. Is that south of the railroad crossing?
A. Yes sir.
Q. How far is it from the point where Main Street crosses the railroad track to the corporate limits of Harriston, the north line?
A. 2,315 feet.
Q. Does the corporate line cross the Y. & M. V. north of the freight depot?
A. Yes sir, north of the freight depot.
Q. Is that cattle gap within the corporate limits of the town of Harriston?
A. No sir.
133 Q. Was Pole Gibson with you when you made that survey?
A. Yes sir.
Q. State whether or not he pointed out to you where the body of Mr. Mullins was found?
A. He did.
Q. He pointed it out to you?
A. Yes sir.
Q. Did you measure from that point, the point that was pointed out to you as the place where Mr. Mullins' body was found, to the corporate line of the town of Harriston?
A. Yes sir.
Q. How far was this point from the corporate line of the town of Harriston?
A. 577 feet.
Q. Was the point where the body was found inside or outside the corporate limits?
A. Outside of the corporate limits, according to the measurement and maps I have.
Q. What direction from the point where the body was found to the corporate limit of the town?

A. South, generally speaking.

Q. When you were over there making that measurement, did you walk along side of the track there?

A. Yes sir.

Q. Did you walk between those two tracks?

A. Yes sir.

Q. Did you walk along there where Pole Gibson pointed out to you as the point where Mullins was found?

A. Yes sir.

Q. What condition did you find the tracks and ground between the tracks along there?

A. Why, it was about like all the tracks I have even seen, I did not notice anything particular about it.

Q. Did you find it difficult to walk along there?

A. Not at all.

Q. Nothing there to attract your attention?

A. Nothing that I noticed.

134 Q. When did you make that survey?

A. March 22, 1916.

Cross-examination.

By Mr. Reily:

Q. You did not notice this track closely?

A. No sir, I never had any occasion to examine it.

Q. It looked about like other tracks you had seen?

A. Yes sir.

Q. The road bed was about like the average track?

A. Yes sir.

Q. Isn't it a fact that there is a lot of loose rocks there between those tracks and when you walk your feet slip backwards?

A. I never noticed it, did not pay any attention to it.

Q. Who employed you to make this map you have testified about?

A. Mr. Doyle, the Claim Agent, I think he is.

Q. Did he tell you what map to get it from?

A. No sir.

Q. Did he point out the map to you?

A. No sir.

Q. You took your measurement from that map?

A. Yes sir.

Q. Did you make the measurements yourself?

A. Yes sir.

Q. You went by this other map?

A. Yes sir.

Q. Have you a certified copy of it with you?

A. No sir.

Q. Didn't you know that some years ago they extended the limits of the town of Harriston so as to gain two more votes during a liquor election?

A. I heard something about that.

Q. They did extend the line?

Objected to by counsel for defendant.
Objection overruled and defendant excepted.

A. I heard that.
135 Q. All the information that you have concerning the line is what you have gained from this other map?
A. Yes sir.
Q. You haven't a certified copy of it with you?
A. No sir.

Now comes the plaintiff and moves the court to exclude from the jury the testimony of this witness because the evidence shows that his information was obtained from a map, of which he has no certified copy and the map is the best evidence, and for the reason that the witness has not adjusted his instrument as required by Section 4971 of the Code of 1906.
Motion overruled and plaintiff excepted.

Q. Is your map based upon the correctness of this other map?
A. Yes sir.
Q. You don't know whether this map is correct or not?
A. No sir. Mine is correct if the other is.

Redirect examination.

By Mr. Kennedy:

Q. Where did you get this other map from?
A. From the records in the Chancery Clerk's office of Jefferson County in Book R. R. on pages 118 and 119.
Q. Did you make the measurements on the ground yourself?
A. Yes sir.
Q. You testified about the extending of the lines in Harriston; did they afterwards *rescend* those lines?
A. Yes sir.

Mr. I. T. PATRICK being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Kennedy:

Q. What is your name?
A. I. T. Patrick.
Q. Where do you live?
A. Vicksburg, Mississippi.
136 Q. What is your business?
A. Carpenter by trade, photographer by profession.
Q. Do you work for the Y. & M. V.?
A. No sir.
Q. Did you make any pictures of the tracks in Harriston?
A. Yes sir.
Q. At whose request?

A. Mr. Lang, the leading photographer in Vicksburg.
Q. Do you know whether it was not at the request of the Y. & M. V.?
A. Yes sir.
Q. Who went with you to Harriston?
A. Nobody.
Q. Was Mr. Doyle there?
A. Yes sir.
Q. Who is he?
A. I think he is the claim agent for the Y. & M. V.
Q. Did you see a negro by the name of Pole Gibson there?
A. I did not know his name, there was a darkey there.
Q. Did the negro point out to you where Mr. Mullins' body was found?
A. He stood on the spot where he said the body was found.
Q. Take this picture I hand you and state whether or not it is a picture taken by you of the track of the Y. & M. V. in the town of Harriston, north of the passenger depot?
A. Yes sir.
Q. Do you know that man that appears in that picture?
A. Not his name, no sir. I never saw him before that day.
Q. Do you know whether or not it is Pole Gibson?
A. I don't know his name.

Picture introduced in evidence and marked Exhibit A to Mr. Patrick's testimony.

137 Q. What picture is this I hand you?
A. It is another view of the yards in Harriston north of the depot.
Q. Who took this picture?
A. I took it.

Picture introduced in evidence and marked Exhibit B to Mr. Patrick's testimony.

138 Q. What is this I hand you?
A. It is a picture of the track looking south from north of the cattle gap.

Picture introduced in evidence and marked Exhibit C to Mr. Patrick's testimony.
Plaintiff objects to the introduction of pictures marked Exhibit A and Exhibit C, but not Exhibit B.
Objection overruled and plaintiff excepted.

Q. I notice some writing on the back of each picture, who wrote that?
A. I did.
Q. Is that a correct statement of the place where the picture was taken and the condition?
A. Yes sir.

Now comes the plaintiff and objects to the introduction of this writing on the back of the pictures as hearsay, as there is no evidence that this witness knew anything about the distances there or knew anything about this accident or where it occurred.

Objection overruled and plaintiff excepted.

Q. Did you go to Harriston on the train?

A. Yes sir.

Q. Where did you get off?

139 A. At Harriston.

Q. At the passenger depot?

A. Yes sir.

Q. How did you go up to the ground where these pictures were taken?

A. I walked up there.

Q. Did you notice the tracks or the ground between the tracks as you walked up there?

A. Not particularly.

Q. Was it so rough that your attention was called to it?

A. No sir.

Q. How did it compare with other tracks and yards you have seen?

A. Very favorably. The track seemed to me to be in good condition.

Q. No employee of the company called your attention to it at that time?

A. No sir.

Q. Was there anything to attract your attention?

A. No sir.

Cross-examination.

By Mr. Reily:

Q. Do you remember the day of the week you went down there?

A. Wednesday, March 21st.

Q. Where did you find Pole Gibson?

A. I don't remember whether he was working or down at the depot.

Q. He is one of the employees of the company?

A. I cannot say as to that.

Q. Pole Gilson went with you when you took the pictures?

A. He was there, yes sir.

Q. Where did you find Mr. Doyle?

A. He was not looking for me, he was expecting Mr. Lang, but some one directed me to his office and I went over there.

Q. You went to Mr. Doyle's office?

A. Yes sir.

140 Q. Did he go with you?

A. I believe so.

Q. He told you first what views he wanted?

A. Yes sir.

Q. He told you exactly what portions he wanted a picture of?
A. Just about.
Q. Did he tell you where to stand when you took the picture?
A. He gave me an idea of what he wanted and I did the rest myself.
Q. Pole Gibson was with you?
A. The darkey that is in the picture, I don't know his name.
Q. You took the pictures?
A. Yes sir.

Pole Gibson being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Kennedy:

Q. Where do you live?
A. Harriston, Mississippi.
Q. Who do you work for?
A. I work for the Y. & M. V.
Q. Do you remember about an occurrence last year when it is said that Mr. Mullins was hurt by a train in Harriston?
A. Yes sir, I do.
Q. About what time of night was the accident?
A. When I looked at the clock it was 5 minutes after 4.
Q. Did you go down to the railroad track where he was?
A. Yes sir.
Q. Are you familiar with the tracks and switches around Harriston?
A. Yes sir, I am.
Q. You know where Mr. Mullins was found?
A. Yes sir.
Q. Did you point out that spot where you found Mr. Mullins to Mr. Harper?
141 A. Yes sir, I did.
Q. Did you point out the spot where you found Mr. Mullins to Mr. Patrick, the man who took some pictures down there?
A. Yes sir.
Q. State whether or not the pictures were taken with you standing on the spot where you found Mr. Mullins?
A. Yes sir.
Q. What is that picture I hand you?
A. That is me.
Q. You don't see that railroad track and cattle gap do you?
A. Yes sir, the railroad tracks and cattle gap are both there.
Q. State whether or not in that picture you are standing on the spot where you found Mr. Mullins?
A. Yes sir, on the spot right where I found him.
Q. How far was Mr. Mullins from the cattle guard when you found him that night?

A. About 30 or 33 feet, just about a rail, I works there all the time and a rail is about 30 or 33 feet.
Q. What direction was he from the cattle guard?
A. He was south of the cattle guard.
Q. Back towards the passenger depot?
A. Yes sir.
Q. Did you point out to Mr. Harper the correct place?
A. Yes sir, the very spot.
Q. Did you point out to the photographer, the picture man, the correct place?
A. I did.
Q. Do you remember when Mr. Wade, a surveyor, come down there and surveyed that track along there?
A. I didn't know his name, but some man come down there and done some surveying.
Q. Did you point out to him the correct place where Mr. Mullins was found?
A. Yes sir.

Cross-examination.

By Mr. Reily:

142 Q. You did not hear that train until after the man was hurt?
A. No sir, I was asleep when it happened.
Q. Your wife was awake?
—. ——.
Q. You all went down there together?
A. Yes sir.
Q. Martha Gipson is your wife?
A. Yes sir.
Q. You all went down there where he was?
A. Yes sir.
Q. Was he suffering much when you got down there?
A. I don't know, he did not say, but he had a right to be.
Q. What was his condition?
A. His arm was mashed.
Q. Did he make any noise like he was suffering?
A. He said to come to him and do something for him, he was going to die.
Q. You don't know about the train running over his arm?
A. No sir, I did not see it run over his arm.
Q. You found him there?
A. Yes sir.
Q. When that gentleman came out there, you stood up on the spot where you found this man?
A. Yes sir.
Q. Was Mr. Doyle there?
A. He was up there, I think.
Q. That is him sitting over there?
A. Yes sir.

Q. He is claim agent of the railroad?
A. So it is said.
Q. When you showed this place to this picture man were you and are you now still with the company?
A. Yes sir.
Q. Do you live in the city limits?
A. They make me pay street taxes.
Q. With reference to the cattle gap, is your house north or south of the cattle gap?
A. It is west of the cattle gap.

143 Redirect examination.

By Mr. Kennedy:

Q. How far from the cattle guard do you live?
A. About 150 yards, maybe more and maybe less.
Q. Did you see Mr. Doyle when the picture was taken?
A. He was back behind us.
Q. Did you point out to Mr. Doyle where this body was found?
A. I showed Mr. Harper.
Q. Did Mr. Doyle point out the place to you?
A. I showed it to him.

Recross-examination.

By Mr. Reily:

Q. You say you are 150 yards from the cattle gap, is that north or south of the cattle gap?
A. That is west of the cattle gap.

Mr. SHAW being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Ratcliff:

Q. Where do you live?
A. Vicksburg.
Q. Who are you employed by?
A. The Y. & M. V.
Q. In what capacity are you employed?
A. Assistant Car Foreman.
Q. Have you anything to do with the inspecting of trains?
A. Yes sir.
Q. Do you remember the occasion when it is said that Mr. Mullins was hurt in Harriston?
A. Yes sir.
Q. Did you inspect that train upon which he worked?
A. I did.
Q. Where did you inspect it?
A. At Vicksburg.

144 Q. State whether or not that train was in good condition, I mean everything about the cars.
A. Yes sir, everything in O. K. condition.
Q. State whether or not all the steps and hand-holds about the cars were in good condition?
A. Everything in perfect order.
Q. Did you inspect the caboose or coach?
A. Yes sir.
Q. The train, you say, then, was in perfect order?
A. Yes sir, everything was in perfect order.
Q. How long have you been engaged in that business?
A. About 25 years.
Q. Do you know when a car is in proper shape?
A. Yes sir.
Q. Have you worked for any road besides the Y. & M. V?
A. Yes sir.
Q. What other railroads?
A. Delaware, Lackawanna & Western.
Q. What time did you inspect that train?
A. The same morning it arrived.

Cross-examination.

By Mr. Reily:

Q. You say you are assistant car foreman?
A. Yes sir.
Q. What occasioned your inspection of the cars?
A. To find any defect in the safety appliances, if any.
Q. You had heard of the injury?
A. I was told to make a special inspection.
Q. On account of the injury?
A. Yes sir.
Q. That was a freight train?
A. Yes sir.
Q. Did have a caboose on it?
A. No sir.
Q. State whether or not on a caboose there is a long iron bar in a *short* of half-moon shape, for a hand hold?
145 A. Yes sir.
Q. There was a passenger coach on this train?
A. Yes sir.
Q. State whether or not, as a matter of fact, that it is easier to catch a standard caboose than it is to catch a coach?
A. Yes s ir, I presume it is.
Q. How many cars and coaches on that train in all?
A. 33.
Q. That was when it got to Vicksburg?
A. Yes sir.
Q. A freight train leaves cars of freight at different places along the road, does it not?
A. Yes sir.

Q. It sets out cars and takes in cars?
A. Sometimes.
Q. State if that isn't what a freight train is for?
A. Yes sir.
Q. How many stations between Vicksburg and Harriston?
A. I have never counted them up.
Q. What is the distance?
A. I cannot say as to that.
Q. The regular fare is 3¢ per mile?
A. Won't be positive of that.
Q. You don't know how many cars were taken out and put in that train on the road?
A. No sir, I know nothing of that.
Q. You simply inspected the cars when they reached Vicksburg?
A. I inspected the entire train when it arrived.
Q. Did you make any record of the cars, number, etc?
A. Yes sir.

Mr. Tony Lang being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Ratcliff:

146 Q. What is your name?
A. Tonly Lang.
Q. Where do you live?
A. New Orleans.
Q. What is your business?
A. Conductor.
Q. For whom do you work?
A. Y. & M. V.
Q. How long have you worked for the Y. & M. V.?
A. 26 years.
Q. Do you remember the occasion when it was said that Mr. Mullins was hurt in Harriston?
A. Yes sir.
Q. Where were you that night?
A. I was in Harriston.
Q. What train did you have charge of that night?
A. It was an extra, I don't remember the engine number. We were making the Harriston turn that night.
Q. What do you mean by the Harriston turn?
A. Coming from Vicksburg to Harriston and back.
Q. Was your train in Harriston when Mr. Stephens' extra freight pulled out for Vicksburg?
A. Yes sir.
Q. When did you first hear of this accident?
A. It was a little after four in the morning.
Q. Where was your engine at that time?
A. Standing at the coal chute.

Q. What did you do?

A. The first I heard of it was the telegraph operator came to me and told me that he was hurt and I gave order to have the engine turned for Natchez and pick up the caboose, and I went to where Mullins was.

Q. What did you do then?

A. We picked him up and put him on the cushion in the caboose.

Q. What then?

A. Went to the office and got my running orders to go to Natchez.

Q. You then took him to Natchez?

147 A. Yes sir.

Q. Did you know Mr. Mullins?

A. Yes sir.

Q. What position did he hold?

A. Flagman.

Q. What do you mean by running orders?

A. When we make a run that is not a schedule run we have to get what is called running orders from the train dispatcher; that is, orders to make the extra run.

Q. What time did your train leave Harriston for Natchez?

A. 4:35 a. m.

Q. Why was the lapse of time between the time you heard he was hurt and the time of leaving?

A. Why when I heard of the accident my engine was headed towards Vicksburg and before I could go to Natchez it had to be turned, and I had that done while I was waiting on the running order.

Q. Where do you get the order from?

A. Train dispatcher.

Q. Where was the train dispatcher?

A. Wilson, Louisiana.

Q. While you were waiting for the order you got your engine turned and ready to go?

A. Yes sir.

Q. What was your first stop after you left Harriston?

A. We stopped at Fayette for the doctor.

Q. How long were you in Fayette?

A. Three or four minutes.

Q. Who was the doctor?

A. Lewis, I believe, was his name.

Q. What did you do then?

A. Came right on into Natchez.

Q. What time did you reach Natchez?

A. 5:30.

Q. State whether or not your train made the best possible time for it to do?

148 A. Yes sir, 28 miles in 55 minutes.

Cross-examination.

By Mr. Reily:

Q. Where did you find this man?
A. He was laying on his back a little distance above the coal chute.
Q. A little above the coal chute?
A. Kinder above the coal chute.
Q. You came straight to Natchez as you have testified?
A. Yes sir.
Q. When you got to Natchez was the ambulance at the station?
A. Not at the time we arrived.
Q. Was Dr. Lewis there?
A. Yes sir.
Q. Was Dr. Sessions there?
A. Not when we arrived.
Q. Did you telephone for the ambulance after you got there?
A. Yes sir.
Q. Telephoned for it after you got there?
A. Yes sir, promptly.
Q. Was that young man suffering?
A. Did not appear to be. He talked to me, I asked him how this thing happened, and he said he didn't want any foolish questions.
Q. The arm was just hanging on by the tissues?
A. I never examined that.
Q. Did he bleed much?
A. I never noticed.
Q. Did you see the blood dripping from the caboose when you reacher Natchez?
A. When I was coming back from the telephone I noticed a little blood dripping from the caboose.
Q. Through the caboose onto the ground?
A. Yes sir.
Q. You don't know how much blood he lost?
A. No sir.
149 Q. You tell the jury you had to phone for the ambulance after you reached Natchez?
A. Yes sir, immediately.
Q. Do you know whether or not the dispatcher had notified the ambulance to be there?
A. I don't know about that.
Q. Where did you find this man?
A. Just north of the coal chute, I don't know how far north.
Q. Did a darkey point him out to you?
A. Yes sir.
Q. It was dark up there?
A. Yes sir.
Q. That was in the switch yards of the company?
A. Yes sir, it was in the yard.
Q. There is no light up there at all?
A. The switch lights.

Q. Was there any light up there to light up the yards so a man could see how to catch a train?
A. I did not see any.

Redirect examination.

By Mr. Kennedy:

Q. Are switch lights put in the yard for the purpose of giving light to see how to work?
A. No sir, to indicate the position of the switch.
Q. Are the yards of the railroad company lighted up for people to see how to work?

Now comes the plaintiff and objects to this testimony because the fact that the railroad company might not obey the law in other places does not excuse them for not providing a safe place to work, as required by law, at this point.
Objection sustained and defendant excepted.

Q. I understand you to say there were no lights there except the switch lights?
A. Yes sir.
Q. The switch lights indicate the location of the switch?
A. Yes sir.
150 Q. How long have you been running on the Y. & M. V. through Harriston?
A. About 20 years.
Q. Do you know the condition of the tracks and road bed in Harriston.
A. Yes sir.
Q. Do you know the condition of the ground in and around that house track switch north of the passenger depot, and between the passing track and main line?
A. Yes sir.
Q. Tell the jury the condition there.
Q. The track is gravelled there and is level, and is one of the best portions of track we have on the road.
Q. Do you ever have occasion to use that portion of the yards?
A. Yes sir.
Q. Do you use it often?
A. Every time I take a train through there and have work to do.
Q. Have you ever had any inconvenience there or found it unsafe to get on a train there?
A. Never have.

Recross-examination.

By Mr. Reily:

Q. The yard in Harriston is the connecting point between Jackson and Natchez and Vicksburg and New Orleans, is it not?
A. Yes sir.

Q. A great deal of switching and transferring is done in that yard?
A. Yes sir, a good deal.
Q. A good many trains pass through there daily?
A. Yes sir.
Q. The fact is that the yards of Harriston are used considerably?
A. Yes sir.
Q. You tell the jury that the ground between the tracks from north of the freight depot to the cattle gap is in a level and
151 sound condition?
A. Yes sir, it is kept in fine shape.

Mr. SHEETS being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Ratcliff:

Q. Where do you live?
A. Wilson, Louisiana.
Q. Who are you employed by?
A. Y. & M. V.
Q. In what capacity?
A. Train Dispatcher.
Q. Were you on duty the night that it is said that Mr. Mullins was hurt in Harriston?
A. Yes sir.
Q. When you heard of the accident what did you do?
A. I ordered a train that was already there to turn and pick him up and go to Natchez.
Q. What did you do with reference to finding out where he wanted to go, whether to Vicksburg or Natchez?
A. The engine was headed towards Vicksburg and to go to Natchez there would be some delay in turning, but I asked where he wanted to go and they telegraphed that he wanted to go to Natchez, so I ordered the engine turned and gave orders to Natchez.
Q. After you got the train off what did you —?
A. Put in a long distance call for the agent at Natchez?
Q. For what purpose?
A. I wanted to notify him so that he could see about arranging *from* him getting to the hospital or sanitarium upon his arrival. I knew his mother was living in Natchez and I wanted the agent to find out where they wanted him to go and have everything ready when he arrived?
Q. What was your object in that?
A. To prevent delay in getting him under medical attention.
152 Q. Did you put in a call for any one else?
A. I put in a call a little later for the hospital.
Q. Were you able to get any one?
A. No sir, not until after the train arrived.
Q. What was the only way you could reach Natchez?
A. By long-distance telephone.

Q. Why could you not telegraph there?
A. The office there is not open from 12:05 a. m. to 7:30 a. m.

Cross-examination.

By Mr. Reily:

Q. You received information from Harriston that the young man was hurt?

—. ——.

Q. What was you duty?
A. To get him somewhere for medical attention.
Q. You realized that was your duty?
A. Yes sir.
Q. What did you do?
A. I ascertained from the operator there where he wanted to go, there was already an engine and caboose there, we could move him right away.
Q. There was a train there?
A. Yes sir.
Q. You are the train dispatcher?
A. Yes sir.
Q. You found out he wanted to come to Natchez and you so instructed?
A. Yes sir.
Q. You realized you should get him to medical attention, and put in a call for the agent at Natchez?
A. Yes sir.
Q. Did you get him?
A. Not until after the train reached there.
Q. The company has a physician here?
A. There are two here.
Q. You knew that?
A. Yes sir.
153 Q Did you know who they were?
A. Yes sir.
Q. Did you also put in a call for him?
A. No sir.
Q. Did you ever get the hospital here?
A. Never did.
Q. You put in a call for them?
A. Yes sir.
Q. And you tried to get the agent?
A. Yes sir.
Q. You never told the hospital to have an ambulance at the train?
A. Never did get them, no sir.
Q. Never rang the company's physician at all?
A. We got the one at Fayette.
Q. Dr. Harrison is the physician at Fayette?
A. Yes sir. We would not try to run him to Natchez without a physician.
Q. You rang Natchez so as to have an ambulance at the train?

A. I ran[t] the agent, so he could arrange for that.
Q. You realized that was your duty?
A. Yes sir.

Dr. W. H. H. LEWIS being called on behalf of the defendant and being first duly sworn, testified as follows:

Direct examination.

By Mr. Ratcliff:

Q. Where do you live?
A. Fayette, Jefferson County.
Q. What is your business?
A. I am a physician.
Q. Are you a graduate of any school?
A. The Tuiane University of La. in the class of '89.
Q. How long have you been practicing medicine?
A. Since April 3, 1889.
Q. Do you remember an occasion when young Mullins was hurt in Harriston?
A. Yes sir.
154 Q. What was the information you received of the accident?
A. Through a telephone call from E. Barnes the night operator, asking me to meet the train at Fayette.
Q. Did you meet it?
A. Yes sir.
Q. Was there any delay in meeting it?
A. When the train stopped I was possibly a hundred yards from it.
Q. You were about a hundred yards from the train when it stopped?
A. Somewhere about that distance, maybe not quite that far
Q. State whether or not you got there as quickly as possible?
A. Yes sir, just as quickly as possible, as soon as I got the message, I got ready immediately. The train had left Harriston when they phoned me.
Q. State what you did?
A. Well the first thing, I examined him to see if there was any hemorrhage, then he complained of a good deal of pain and I gave him a quarter grain of morphine and one one fiftieth atrophine.
Q. State whether or not there was anything that could have been done that you did not do?
A. No sir. I did everything that was possible for me to do for him.
Q. You examined him for hemorrhage and found none?
A. Yes sir.
Q. If there had been hemorrhage what would you have done?
A. Applied a tourniquet or if necessary would have taken up the blood vessels.
Q. Was he conscious?
A. Thoroughly so.

Q. Did you have any conversation?

A. Yes sir, I was talking to him and asked him how he got hurt and he said "None of your damn fool questions" and I told him that it was only a civil question I was asking and I deserved a civil answer. He then asked me for a Picayune cigarette, I told
155 him I did not have a Picayune and he asked me for one I was smoking, I had just made one, and gave it to him and he smoked it.

Q. Were you with him from that time you boarded the train at Fayette until he arrived at the sanitorium?

A. I was with him all the time with the exception of a few seconds after we arrived at Natchez, I left the conductor with him and went and phoned for the ambulance, and he came right back to him, when I got back Dr. Sessions was there.

Q. You sayed with him until he reached the sanitorium?

A. Yes sir.

Cross-examination.

By Mr. Reily:

Q. Isn't it a fact that you have abandoned your profession?

A. No sir.

Q. You have a road contract?

A. Yes sir, I have a road contract.

Q. How many men do you employ?

A. From 5 to 15 men.

Q. You look after them yourself?

A. I have a foreman on the road and my farm both.

Q. You look after them both?

A. Yes sir.

Q. Is it a fact that you have practically quit your practice?

A. Yes sir, I don't go at the beck and call of everybody, I practice among my friends and some of my old patients.

Q. You still practice, but do not do a general practice?

A. I practice in Judge Truly's family and Mr. Felix Noble's family and among my friends like that but I don't go at everybody's beck and call.

Q. How often do you visit your plantation?

A. About once a week?

Q. How often do you visit your roads?

A. I am on the road practically every day.

Defendant offers in evidence a certified copy of the order of the Railroad Commission fixing the limits of the 6 mile an hour limit in the Town of Harriston under section 4043 of the Code
156 authorizing the Railroad Commissioner to reduce the restriction limits wherein trains must run 6 miles per hour. This certified copy showing that the 6 mile — in Harriston only applies over Main street.

Introduced in evidence and marked "Exhibit D for Defendant."

157 I hereby certify that the attached is a true and correct copy of an order passed by the Mississippi Railroad Commission on the 17th day of June, 1913, relating to the speed of trains in limits of municipalities of Mississippi on the Illinois Central and Yazoo & Mississippi Valley Railroads and I further certify that said order has been continuously in full force and effect since June 17th, 1913, date of adoption, and is taken from Minute Book 5, page 578, of the records of this office and of which I am the proper custodian.

Witness my hand and seal this the 11th day of February 1916.

[SEAL.] JAMES GALCERAN,
Secretary Mississippi Railroad Commission.

Railroad Commission of Mississippi.

Order Relating to the Speed of Trains in Limits of Municipalities of Mississippi.

June 17, 1913.

In the Matter of the Petition of the Brotherhood of Locomotive Engineers, filed by J. M. Hoskins, Chairman of the Committee from said Brotherhood, on his own behalf and upon behalf of other engineers on the Illinois Central Railroad and the Yazoo and Mississippi Valley Railroad, in the State of Mississippi.

This cause coming on this day for hearing upon written petition of the Brotherhood of Locomotive Engineers, through J. M. Hoskins, Chairman of their Committee, upon behalf of himself and other engineers on the Illinois Central and Yazoo and Mississippi Valley Railroads for the fixing of speed limits as prayed; and due investigation having been made, the Commission considering the law and the evidence in the matter, doth adjudge as follows:

158 It is ordered, in pursuance of the authority conferred on this Commission by Paragraph 4043 of the Mississippi Code of 1906 that the Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company may run their trains at a rate of speed exceeding six miles per hour within the limits of all municipalities hereinafter mentioned, except within the limits hereinafter particularly set forth with reference to each of the municipalities:

Yazoo and Mississippi Valley Railroad Company.

(Memphis Division, 2nd.)

Eden: Over crossing north of depot and 200 feet each way therefrom.

(Natchez District.)

Jackson: From Clifton Street to Passenger Depot, and between the same.

Raymond: Over first street north of depot and over first street south of depot, and 100 feet south of said last-mentioned street, and between the same.

Learned: Over Main street and Utica Road, and between the same.

Utica: 100 feet each way from a point on track opposite center of depot.

Hermanville: Over street north of depot, and 100 feet each side of said street.

Patterson: Over the first two streets south of depot, and between the same.

Harriston: Over Main Street.

Fayette: Over road crossings north and south of depot, and between the same.

Natchez: North side of Devereux, Pine, Rankin, Union, Commerce, Pearl, Wall, Canal and Broadway Streets, and between the same.

Woodville: Over Third, South Street.

(Birmingham Division.)

159 Corinth: From station north to Fourth Street, and from station south to Linden street, and between the same.

160 Mrs. CLARA J. MULLINS, being called in rebuttal, testified as follows:

Direct examination.

By Mr. Reily:

Q. It has been testified here by some of the defendant's witnesses that your son run in and out of Harriston some time previous to this injury, I will ask you if that is a fact?

A. No sir, he did not run through Harriston.

Q. Where did he run previous to this injury?

Objected to by counsel for defendant unless she knows of her own personal knowledge.

Objection overruled and defendant excepted.

A. He was running from Wilson to Harrihan, he had run for a while on the Natchez and Jackson branch, but that was about a year ago, he had been running down on the Southern division, since then.

Q. Had not worked through Harriston?

A. No sir, I know that to be a positive fact.

Q. You know that to be a positive fact?

A. Yes sir.

Cross-examination.

By Mr. Kennedy:

Q. You don't know anything about your son running through Harriston?

A. I know he run from Wilson to Harrihan, on the southern division.

Q. How do you know he was down there?

A. Couldn't I tell from his letters where he was?

Q. You believe what he wrote you?

A. He wouldn't have told me an untruth.

Q. All you know about your son working on the southern division is what he wrote you?

A. Yes sir, and if he had been running on this Jackson and Natchez branch he would have been staying at home, I sure would know if he was doing that.

Q. Have you ever seen him in Harriston?

A. I saw him in Harriston several years ago.

161 Q. Have you seen him in Harriston in the past two or three years?

A. I saw him in Harriston about 3 years ago.

Q. Did he flag on the mixed train from Natchez to Jackson?

A. For a while about two years ago.

Q. Did he work on that train that gets here about 11:20?

A. He worked on that train about four years ago.

Now comes the defendant and objects to the testimony of this witness as hearsay.

Objection overruled and defendant excepted.

Both rest.

Now comes the defendant and moves the Court to rule out the evidence in this case and instruct the jury peremptorily to find for the defendant because the evidence fails to show any negligence whatever on the part of the defendant company as the proximate cause of the injury received by complainant's decedent; because the evidence fails to show any defect of any kind or character in any wise of the appliances used by the railroad company or that any such defect was the cause of the deceased's injury; because the statute of the State of Mississippi making the proof of the injury by moving cars or engines prima facie evidence of want of skill in handling same does not apply in this case, it being a case coming under the Federal Employers' Liability Act and the Statute of the State of Mississippi is superseded by said act; because the evidence in this case shows that if said deceased's injury was caused by a train of the defendant company, that such injury and death was brought about by such manner and means as that the risk of said injury and death is assumed by said decedent under and by virtue of his contract of employment and was not the result of any negligence whatever on the part of the defendant. Motion overruled by the court and the defendant excepted to the ruling of the court.

162 I, W. E. Corban, Official Stenographer of the Sixth Judicial District of Mississippi, do hereby certify that the foregoing one hundred and forty two (142) pages contains a full, true and correct copy of the stenographic notes taken by me in cause styled

Mrs. Clara J. Mullins, Administratrix of the Estate of James Davis Mullins, versus Yazoo & Mississippi Valley Railroad Company, #657 on the Civil Docket of the Circuit Court of Adams County, Mississippi.

I further certify that I have this day notified Messrs. Reily & McCall of Meridian, Mississippi, Attorneys for the Plaintiff and Messrs. Ratcliff & Kennedy, of Natchez, Mississippi, Attorneys for the Defendant, that I have this day filed said notes with the Clerk of the Circuit Court of Adams County, Mississippi.

Witness my signature, this the 9th day of May, 1916.

W. E. CORBAN,
Official Stenographer.

Examined and found correct.

RATCLIFF & KENNEDY,
Attys. for Appellant.

We hereby certify that we have this day mailed to M. W. Reily, attorney for appellee this transcript of the record to Meridian, his usual address.

This 12th day of May, 1916.

RATCLIFF AND KENNEDY.

Examined and found correct.

REILY & McCALL,
Attys. for Appellee.

We hereby certify that we have this day mailed to Lamar Lambert, Circuit Clerk of Adams County, this transcript to his usual address at Natchez, Miss.

REILY & McCALL,
Attorneys for Appellee.

Endorsed on back as follows, to-wit: Filed May 10, 1916. Lamar Lambert, Circuit Clerk.

163 The following instructions were given for the Plaintiff:

(1.) The Court instructs the jury for the plaintiff: That the jury cannot find any amount whatever for the Plaintiff upon the first and second counts of the declaration herein.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

(2.) The Court instructs the jury for the Plaintiff: That it was the absolute duty of the Defendant to furnish the deceased with a safe place to perform the duties incident to his employment and with safe cars and appliances and to operate its cars in a reasonably prudent and careful manner so as to avoid injury to the deceased and

its other employees, and that if the jury believe from the evidence that the defendant was negligent in regard to any of these duties, and that such negligence contributed in whole or in part to the death of the deceased, that in that event the jury are told by the Court that they should find for the Plaintiff.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

(3.) The Court instructs the jury for the Plaintiff: That the burden of proving that James Davis Mullins was guilty of contributory negligence, if any, is upon the Defendant.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

(4.) The Court instructs the jury for the plaintiff: That even though the jury may believe that the deceased was guilty of contributory negligence, that this fact would not bar the Plaintiff from recovering in this case; providing the jury further believe that negligence of the Defendant was wholly or partially responsible for the injuries sustained by the deceased, if any, but that in the event that the jury should believe that both the deceased and the defendant were guilty of negligence which contributed to the injuries sustained by the deceased, that in that event the jury should diminish the amount of damages shown by the evidence to have been sus-
164 tained, if any, in proportion to the amount of negligence attributable to the defendant, if any.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

(5.) The Court instructs the jury for the Plaintiff: That before you can hold the deceased to have assumed the risk from which the deceased sustained the injuries complained of, it devolves upon the Defendant to prove by a preponderance of the evidence that he did so assume the risk which was the cause of the injuries sustained by him.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

(6.) The Court instructs the jury for the Plaintiff: That James Davis Mullins is, under the law, charged with having assumed the risk of dangers normally incident to the occupation in which he was engaged, so far as these are not attributable to his employer's negligence. But that James Davis Mullins had a right to assume that the defendant had exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work in which James Davis Mullins was engaged, and that James Davis Mullins is not to be treated as having assumed the risk arising from a defect

that is attributable to the Defendant's negligence, until the said James Davis Mullins became aware of such defect, or unless it was so plainly observable that he might be presumed to have known of it. That in addition to the above, in order for the said James Davis Mullins to be charged, under the law, with having assumed the risk attributable to the employer's negligence, if such be it must appear that not only that James Davis Mullins knew, or is presumed to have known, of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

(7.) The Court instructs the jury for the Plaintiff: That if you believe from the evidence in this case that the Defendant
165 Railroad Company took charge of the deceased after his injury and brought him to Natchez and later placed him in charge of the Natchez Sanitorium, and that in the performance of these acts the Defendant Company was negligent in failing to provide prompt and proper attention, and that that negligence contributed in whole, or in part, to the death of the deceased, and that up to that time of that negligence the Defendant Company was guilty of no other negligence in this case, then in that event you should find for the plaintiff, but you should not assess any damages for pain and suffering to the deceased prior to the time the defendant company was negligent in attention furnished him after the injuries, if any, and providing you further believe that the deceased was not himself guilty of contributory negligence and did not assume the risk.

Given.

File- April 4, 1916. Lamar Lambert, Clerk.

The Court instructs the jury for the plaintiff: That should you find for the Plaintiff, that you should award such damages as will compensate his Mother for the pecuniary loss which she has sustained, if any, as shown by the evidence because of the death of the said James Davis Mullins; and also such an amount as the jury may believe from the evidence to be sufficient and proper compensation for the physical pain and mental suffering endured by the deceased between the time that he was injured and the time of his death because of the injuries sustained by him, if any.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

The Court instructs the jury for the Plaintiff: That should they find for the Plaintiff, they should return the following verdict: We the jury find for the Plaintiff for the benefit of Mrs. Clara J. Mul-

lins in the amount of $—, not to exceed the amount sued for $40,000.00.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

166 The following instructions were given for the Defendant:

The Court instructs the Jury for the defendant: That this case comes under the Federal Employers' Liability Act, and no presumption of negligence can be indulged against the defendant by reason of any proof of injury by the running of the train, but under this act negligence of the defendant must be affirmatively proven by evidence before the jury to the satisfaction of the jury and must be shown and established by a preponderance of the evidence.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

The Court instructs the jury for the defendant that if they believe from the evidence in this case that the injuries and death of the deceased was caused by the negligence of the deceased in unnecessarily attempting to board a moving train and that this was the proximate cause of the injury and not the negligence of the defendant company, plaintiff cannot recover and your verdict should be for the defendant.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

The Court instructs the jury for the defendant that even though they may believe the railroad company negligent and liable in this case, yet, you are instructed that there can be no recovery by any one or for the benefit of any one except the mother.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

The Court instructs the jury for the deft. that under the Federal Employers' Liability Act, under which this case comes, the plaintiff cannot recover unless the evidence shows that the decedent's injuries *was* caused by the negligence of the officers, agents or employes of the deft. or by reason of some defect or insuffi-iency due to its negligence in its cars, engines, appliances, machinery, track, road bed, ways or works.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

167 The Court instructs the jury for the deft. that the burden of proof is on the plaintiff to show by a preponderance of the

testimony that Mullins was injured on account of the negligence of some officer, agt. or employe of the deft. or on account of a defect due to negligence in its cars, engines, appliances, machinery track, road bed, ways or works, and if she has failed in this she cannot recover.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

The Court further instructs the Jury for the Defendant that the burden of proof is on the pliantiff to establish to the satisfaction of the Jury by a preponderance of the evidence every material allegation of her declaration and which is necessary to her recovery and failure to establish any material and necessary allegation entitles the defendant to a verdict at your hands and you should find for the defendant.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

The Court instructs the jury for the defendant, that before the Plaintiff can recover in this case, it is necessary for her to prove by a preponderance of the evidence to the satisfaction of the Jury that the defendant was guilty of negligence which was the proximate cause of the death of Mullins, and unless the evidence has satisfied the jury that the negligence of defendant was the proximate cause of the injury and death of Mullins they must find a verdict for the defendant.

Given.

Filed April 4, 1916. Lamar Lambert, Clerk.

The Court instructs the jury for the deft. that if they believe from the evidence that Mullins was employed as Flagman by the deft. Co. then he assumed all risks of the employment, except those caused by a violation of the Federal Statutes enacted for safety of employes and before his representative can recover she must show that the defect or violation of the Federal statutes contributed to the injury.

Given.

Filed April 4, 1916. Lamar Lambart, Clerk.

168 The following instructions were refused for the defendant:

The Court instructs the jury for the defendant that under the pleadings and evidence in this case no liability has been shown against the defendant and the jury should find a verdict for the defendant.

Refused.

Filed April 4, 1916. Lamar Lambert, Clerk.

The Court instructs the jury for the defendant, that the evidence in this case as to how the deceased received his injuries shows that they were received in such a manner that the railroad company is not liable, therefor and that by virtue of his contract with the defendant and of his employment, he assumed the risk of all injuries so received and the plaintiff cannot recover.

Refused.

Filed April 4, 1915. Lamar Lambert, Clerk.

The Court instructs the jury for the deft. that if they believe from the evidence that Mullins knew the condition of the yard at Harriston, and continued his work, then he assumed the risk if any, and cannot for that reason recover; that is the condition of the yard.

Refused.

Filed April 4, 1916. Lamar Lambert, Clerk.

On the 3d day of April, 1916, the same being the 7th day of the March Term, 1916, the following order was had and entered upon the Minutes, which is in words and figures as follows, to wit:

#657.

Mrs. Clara J. Mullins, Admr. of Est. James Davis Mullins,

v.

Y. & M. V. R. R. Co.

Damages.

This day came the parties and their attorneys and a jury being called comes as follows, J. D. Ireland and eleven others who being duly elected, empaneled and sworn the issue joined to try, after hearing part of the evidence retired to their room in charge of sworn bailiffs to attend on them until the next sitting of this court, the hour of adjournment having arrived.

169-70 Afterwards to-wit: On the 4th day of April, 1916, the same being the 8th day of the March Term, 1916, the following order was had and entered upon the Minutes, which is in words and figures as follows, to wit:

#657.

Mrs. Clara J. Mullins, Admr. of Est. James Davis Mullins,

vs.

Y. and M. V. R. R. Co.

Damages.

This day came the parties and their attorneys, and the jury empaneled and sworn on a former day of this term of Court they having been kept together and in charge of sworn Bailiffs since the last sitting of this Court, to-wit: J. D. Ireland and eleven others who being duly elected, empaneled and sworn the issue joined to try, after hearing all the evidence, argument of counsel and receiving the instructions of the Court, upon their oaths do say "We the jury find for the Plaintiff for the benefit of Mrs. Clara J. Mullins in the amount of $20,000.00. J. E. O'Kelly, Foreman."

Thereupon it is ordered by the Court here that the plaintiff Mrs. Clara J. Mullins, administratrix of the Estate of James Davis Mullins deceased do have and recover of and from the Yazoo and Mississippi Valley Railroad Company, a corporation, the sum of Twenty Thousand Dollars with interest at the legal rate from date hereof and all costs to be taxed for which let execution issue.

Afterwards to-wit: On the 6th day of April, 1916, the following Motion for New Trial, was filed in my office, which is in words and figures as follows, to-wit:

Mrs. Clara J. Mullins

vs.

Y. & M. V. R. R. Co.

Now comes the Defendant, by its attorneys, and moves the Court to set aside the verdict and the judgment rendered herein and
171 grant it a new trial for the following reasons:

1st. Because the verdict was contrary to the law and the evidence.

2nd. Because the Court erred in admitting testimony offered by the Plaintiff over the objection of the Defendant as shown by the stenographer's notes to which ruling of the Court the Defendant then and there excepted.

3d. Because the Court erred in refusing to admit testimony offered by the Defendant and to which the Plaintiff objected to which ruling of the Court the Defendant then and there excepted.

4th. Because the Court erred in overruling the motion for a peremptory instruction made at the end of Plaintiff's testimony and because the Court erred in overruling the motion for a peremptory instruction made at the conclusion of all the testimony.

5th. Because the Court erred in not requiring the Plaintiff to elect upon which Count of the Declaration she would stand and overruling the motion of the Defendant requiring her to do this.

6th. Because the Court erred in granting each and every instruction for the Plaintiff marked "Given" in the record.

7th. Because the Court erred in refusing instructions asked by the Defendant.

8th. Because the Court erred in permitting the question of any negligence on the part of Defendant, its agents or employees in the handling of deceased after the injury occurred.

9th. Because the jury disregarded and disobeyed the instructions of the Court.

10th. Because the Court erred in admitting any evidence relating to the method of the treatment of the deceased by the physician in whose charge he was placed by the Company and in permitting the jury to pass upon the methods of treatment followed by the physician in reference to him.

11th. Because the Court erred especially in giving instructions numbers 2 and 5 in the record which placed upon the De-
172 fendant a greater burden than the law requires and was especially harmful to it.

12th. Because the verdict of the jury was grossly excessive, nor warranted by the evidence or the law and evincing on the part of the jury, passion and prejudice against the defendant.

RATCLIFF & KENNEDY,
Attys. for Motion.

Endorsed on back as follows, to-wit: 657. Mrs. Clara J. Mullins, Admx. v. Y. & M. V. R. R. Co. Motion for New Trial. Filed April 6, 1916. Lamar Lambert, Clerk. Ratcliff & Kennedy.

Afterwards to-wit, on the 7th day of April, 1916, the same being the 10th day of the March Term, 1916, the following Order was had and entered on the Minutes, which is in words and figures as follows, to-wit:

Motion for New Trial.

=657.

Mrs. Clara J. Mullins, Administratrix of Est. James Davis Mullins,

vs.

Y. and M. V. R. R. Co.

This cause coming on to be heard on motion for a new trial filed herein by defendant and after being duly considered by the Court, it is ordered that said motion be and the same is hereby overruled.

173 THE STATE OF MISSISSIPPI,
County of Adams, sct:

In the Circuit Court.

MRS. CLARA J. MULLINS, Admx.,

vs.

YAZOO & MISS. VALLEY R. R. CO.

The undersigned, Yazoo & Miss. Valley R. R. Co. principal and E. H. Ratcliff and L. T. Kennedy sureties, agree and obligate themselves to pay to Mrs. Clara J. Mullins Admx. of the Est. of John D. Mullins the sum of Forty Thousand Dollars unless the said principal obligor shall satisfy the judgment rendered in the cause above named at March Term A. D. 1916 of Adams Co. Circuit Court, complained of and this day appealed from by the said principal obligor, and also such final judgment as may be made in said cause, and all costs, if the said judgment so complained of and appealed from, be affirmed by the Supreme Court.

Witness our Signatures this 1st day of June A. D. 1916.

YAZOO & MISS. VALLEY R. R. CO.,
By RATCLIFF & KENNEDY, *Attys.*
E. H. RATCLIFF.
L. T. KENNEDY.

The sureties on the above bond, being by me duly sworn, deposed that, over and above their just debts and liabilities, and their contingent liabilities on other bonds, they were worth in visible property, not exempt by law from execution or attachment, as follows, to-wit:
The said E. H. Ratcliff the sum of $30,000.
The said L. T. Kennedy the sum of $10,000.

Subscribed and sworn to before me this 1st day of June A. D. 1916.

LAMAR LAMBERT, *Clerk.*

I approve the above bond and sureties.

LAMAR LAMBERT, *Clerk.*

174 THE STATE OF MISSISSIPPI,
County of Adams:

I, Lamar Lambert, Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing is a true and correct transcript of the Declaration, Pleas, Testimony, Instructions, Orders, Motion, Pleadings and Proceedings had in the case of Mrs. Clara J. Mullins, Admr. of Est. of James Davis Mullins, Decd., v. Yazoo and

Mississippi Valley Railroad Company, numbered 657 on the Court Issue Docket, as the same appears of record and on file in my office.

Given under my hand and seal of Court this the 21st day of September, 1916.

LAMAR LAMBERT,
Circuit Clerk.

Record filed Sept. 23rd 1916. Geo. C. Myers, Clerk.

175 In the Supreme Court of the State of Mississippi to the March Term, 1917.

No. 19420.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appellant,

vs.

MRS. CLARA J. MULLINS, Admr., Appellee.

Assignments of Error.

Comes the appellant by its attorneys, Mayes, Wells, May & Sanders, and prays the court to set aside the judgment of the Circuit Court, and assigns the following errors:

1st. The verdict was contrary to the law and the evidence.

2nd. The verdict was for an amount grossly excessive.

3rd. The court erred in granting each and every instruction given for the plaintiff, as set forth in the transcript.

4th. The court erred in refusing each and every instruction refused to defendant company, and in sustaining objections of plaintiff thereto, as shown by the transcript.

5th. The court erred in excluding evidence offered on behalf of defendant company, and in sustaining objection of plaintiff thereto, as shown by the transcript.

6th. The court erred in overruling objections by defendant to testimony and evidence offered on behalf of the plaintiff and in refusing to exclude the same, as shown by the transcript.

7th. The court erred in overruling defendant's motion for a new trial, and for the reasons set forth therein.

8th. The court erred in modifying the several instruments asked by defendant in the respects shown in the bill of exceptions and transcript herein.

176 9th. The court erred in overruling the defendant's motion to exclude the testimony offered by plaintiff and instructing the jury to return a verdict for the defendant.

Wherefore the appellant prays that the judgment of the lower court be reversed and the cause remanded.

Respectfully submitted,

MAYES, WELLS, MAY & SANDERS,
Attorneys for Appellant.

We, Mayes, Wells, May & Sanders, hereby certify that we have this day mailed, postage prepaid, copy of the foregoing assignment of errors to opposing counsel, Messrs. Reily & McCall, Natchez, Mississippi.

This the 23rd day of February, 1917.

MAYES, WELLS, MAY & SANDERS,
Attorneys for Appellant.

Filed Feb. 24, 1917. Geo. C. Myers, Clerk, by W. J. Brown, D. C.

177 STATE OF MISSISSIPPI,
County of Adams:

In the Supreme Court, to October Term, 1916.

Y. & M. V. R. R. Co., Appellant,

vs.

Mrs. CLARA J. MULLINS, Admx., Appellee.

Assignment of Errors.

Now comes the appellant, by its attorneys, and files the following assignment of errors in the above styled cause and for grounds of error in the Court below set- forth the following:

1st. The Court erred in admitting testimony offered by the plaintiff over the objection of the defendant as shown by the stenographer's notes to which ruling of the court the defendant then and there excepted.

2nd. The Court erred in refusing to omit testimony and to which the plaintiff objected.

3rd. The court erred in overruling the motion for a peremptory instruction to find for the defendant, made at the end of plaintiff's testimony, and because the court erred in overruling a motion for a peremptory instruction made at the conclusion of all the testimony.

4th. Because the court erred *at* not requiring the plaintiff to elect upon which count of the declaration she would stand and overruling a motion of the defendant, requiring her to do this.

5th. The Court erred in granting each and every instruction for the plaintiff marked "Given" in the record.

178 6th. Because the court erred in refusing instructions asked by the defendant.

7th. Because the court erred in permitting the question of any negligence on the part of defendant, its agent and employees in the handling of deceased after the injury occurred.

8th. The court erred in admitting any evidence relating to the treatment of the deceased by the physician in whose charge he was placed by the Company and in permitting the jury to pass upon the method of the treatment follow*ing* by the physician in reference to him.

9th. The court erred especially in the giving of instructions numbered two, four, and five, which placed upon the defendant a greater burden than the law requires and was especially harmful to him.

10th. The verdict of the jury was excessive.

Respectfully submitted,

RATCLIFF & KENNEDY,
Attys. for Appellant.

We do hereby certify that we have this day mailed to Reily & McCall, attorneys-of-record for the appellee in the above styled case, addressed to Meridian, Mississippi, their usual post office address, postage prepaid, a true copy of the above Assignment of Errors.

This the 20th day of October, 1916.

RATCLIFF & KENNEDY,
Attys. for Appellant.

Filed Oct. 21, 1916. Geo. C. Myers, Clerk, by W. J. Brown, D. C.

179 Wednesday, June 6th, 1917.

19420.

YAZOO & MISSISSIPPI VALLEY R. R. Co.

vs.

CLARA J. MULLINS, Admrx.

Argued orally by L. T. Kennedy and Ben. H. Wells for appellant, and M. W. Reily for appellee and submitted on briefs by Ratcliff & Kennedy and Chas. N. Burch and H. D. Minor for appellant, and Reily & McCall for appellee.

Monday, July 2nd, 1917.

19420.

YAZOO & MISSISSIPPI VALLEY R. R. Co.

vs.

CLARA J. MULLINS, Admrx.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Adams County, and this Court having sufficiently examined and considered the same and being of opinion that the judgment of the Court below is excessive, doth order and adjudge that if a remittitur for the sum of seven thousand five hundred dollars be entered, the judgment of the court below will be affirmed, otherwise said judgment will be reversed and this cause remanded, and appellant now, here in open court, entering said remittitur for said sum of seven thousand five hundred dollars, it is ordered and adjudged that the judgment of the

court below rendered herein at the March term 1916, on the 4th day of April, 1916, be and the same is hereby affirmed for the sum of twelve thousand five hundred dollars, and that appellee do have and recover of appellant and E. H. Ratcliff and L. T. Kennedy sureties in the supersedeas bond said sum of $12,500.00, as well as interest on said sum from the date of the rendition of the judgment in the court below till paid, at the rate of six per centum per annum, and also the costs of this cause in the court below, and that appellee do pay the costs of this appeal to be taxed, &c.

180 In the Supreme Court of Mississippi.

No. 19420.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

vs.

MRS. CLARA J. MULLINS, Administratrix.

Suggestion of Error.

We do not frequently trouble the court by the filing of suggestions of error and we realize that the opinions of the court are rendered after mature deliberation, and that suggestions of error are usually unavailing, but in this case, we respectfully suggest that the court has made an erroneous decision.

The case is one which was brought under the Federal Employers' Liability Act and was based upon the alleged negligence of the defendant in failing to furnish safe ways and appliances for the use of the deceased employee, and also that the train was started *as* a dangerous rate of speed. The opinion of the court as we read and understand it concedes that the plaintiff in the court below failed to show any negligence on the part of the railroad, and, therefore, necessarily failed to show that any negligence was the proximate cause of the injury to the deceased which caused his death. It is also conceded in the opinion of the court, that the defendant railroad company affirmatively proved that the train was properly and safely equipped, and that there *was* no defective ways or appliances, and that the train was not negligently handled. The opinion of the court also concedes, that such being the state of the case at the close of all the testimony, a peremptory instruction to the jury
181 should have been given to find for the defendant, but for the saving help of the Mississippi prima facie statute, section 1985 of the Code of 1906, which the court denominates "a present help" in this case of great need. The opinion practically concedes that but for the existence and operation of the Mississippi prima facie statute, there should have been, under the evidence, a peremptory instruction directing a verdict for the defendant. This is a concession that if the case had been tried in Louisiana, or in any other state of the Union where no prima facie statute had been

enacted, there would necessarily have been a directed verdict for the defendant, since the plaintiff failed to make out a case under the Federal Act when measured by that act alone.

Superseding Effect of Federal Act.

All state laws regulating the liability of carriers for injuries to or the death of employes while engaged in interstate commerce were suspended by the Federal Employers' Liability Act. This is held by the following authorities:

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 224 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, #38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, reversing 98 Ark. 240, 135 S. W. 874; North Carolina R. Co. v. Zachary, 232 U. S. 248, 59 L. ed. 591, 34 Sup. Ct. Rep. 505, Ann. Cas. 1914 C. 159, 9 N. C. C. A. 109, reversing 156 N. C. 496, 72 S. E. 858; Seaboard A. L. R. Co. — Horton, 233 U. S. 492 58 L. ed. 1062, 34 Sup.
182 Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494; St. Louis I. M. & S. R. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754, affirming 115 Ark. 483, 171 S. W. 1185; Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, — L. ed. —, 36 Sup. Ct. Rep. 185, affirming 96 Neb. 87, 146 N. W. 1024, S. C. 94 Neb. 317, 143 N. W. 220; Southern P. C. Co. v. McGinnis, 98 C. C. A. 403, 174 Fed. 649; Hogan v. New York C. & H. R. Co., 139 C. C. A. 238, 223 Fed. 890; Oliver v. Northern P. R. Co., 196 Fed. 432; Bottoms v. St. Louis & S. F. R. Co., 179 Fed. 318; Fulgham v. Midland V. R. Co., 167 Fed. 660, reversed on other grounds 104 C. C. A. 151, 181 Fed. 91; Taylor v. Southern R. Co., 178 Fed. 380; Dewberry v. Southern R. Co., 175 Fed. 307; Ex Parte Atlantic C. L. R. Co., 190 Ala. 132, 67 So. 256; Flanders v. Georgia S. & F. R. Co., 68 Fla. 479, 67 So. 68; Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558; Kemdrick v. Chicago & E. I. R. Co., 188 Ill. App. 172; Southern R. Co. v. Howerton, 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025, reversing — Ind. App. —, 101 N. E. 121, 103 N. E. 121; Vandalia R. Co. v. Stringer, 182 Ind. 676, 106 N. E. 865, rehearing denied 182 Ind. 684, 107 N. E. 673; Cole v. Atchison, T. & S. F. R. Co., 92 Kan. 132, 139 Pac. 1177; Louisville & N. R. Co. v. Strange, 156 Ky. 439, 161, S. W. 239; South Covington & C. St. Ry. Co. v. Finan, 153 Ky. 340, 155 S. W. 742; Illinois C. R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31, La. Casse v New Orleans T. & M. R. Co. 135, La. 129, 64 So. 1012. Penny v. New Orleans G. N. R. Co. 135 La. 692, 66 So. 313; Sells v. Atchison, T. & S. F. R. Co. — Mo. —, 181 S. W. 106. Miller v. Kansas City W. R. Co. 180 Mo. App. 371, 168 S. W. 336; Vaughan v. St. Louis & S. F. R. Co. 177 Mo. App. 155, 164 S. W. 144; Rich v.
183 St. Louis & S. F. R. Co. 166 Mo. App. 379, 148 S. W. 1011; Melzner v. Northern P. R. Co. 46 Mont. 277, 127 Pac. 1002;

Shannon v. Boston & M. R. Co. 77 N. H. 349, 92 Atl. 167. Winfield v. New York C. & H. R. R. Co. 216 N. Y. 284, 110 N. E. 614, affirming 168 App. Div. 351, 153 N. Y. Supp. 499; Rogers v. New York C. & H. R. R. Co. — App. Div. —, 157 N. Y. Supp. 83; Renn. v. Seaboard A. L. R. Co. 170 N. C. 128, 86 S. E. 964; Warren v. Hannon, 15 Ohio C. C. R. (N. S.) 289; St. Louis & S. F. R. Co. v. Snowden, — Okla. —, 149 Pac. 1083; Missouri K. & T. R. Co. v. Lenahan, 39 Okla. 283, 135 Pac. 383; Kamboris v. Oregon, W. R. & N. Co 75 Oreg. 358, 146 Pac. 1097; Hogarty v. Phila. & R. R. Co. 245 Pa. 443, 91 Atl. 854; Jones v. Charleston & W. C. R. Co. 98 S. C 197, 82 S. E. 415; Rivera V. Atchison T. & S. F. R. Co. — Tex. Civ. App. —, 149 S. W. 223, 3 N. C. C. A. 788; Gulf C. & S. F. R. Co. v. Lester. — Tex. Civ. App. 149 S. W. 841; Southern E. Co. v. Jacobs, 116 Va. 189, 81 S. E. 99; Findley v. Coal & C. R Co. — W. Va. —, 87 S. E. 198; Rowlands v. Chicago & N. W. R. Co. 149 Wis. 51, 135, N. W. 156, writ of error dismissed 229 U. S. 627, 57 L. ed. 1357, 33 Sup. Ct. Rep. 771.

State statutes must yield to the Federal Employers' Liability Act. Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 60 L. ed. —, 36 Sup. Co. Rep. 683, Affirming 133 C. C. A. 370, 217 Fed. 518.

Negligence as Foundation of Liability.

That negligence on the part of the carrier is the foundation of liability under the Federal Employers' Liability Act either for injuries to or the death of an employee while engaged in
184 interstate commerce has been held by the following authorities:

Seaboard A. L. R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915, C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494; Hawkins v. St. Louis & S. F. R. Co. 189 Mo. App. 201, 174 S. W. 129; Manson v. Great N. R. Co. — N. D. —, 155 N. W. 32; Easter v. Virginian R. Co. — W. Va. —, 86 S. E. 37; Culp v. Virginian R. Co. — Va. —, 87 S. E. 187; Southern R. Co. v. Gray, 241 U. S. 333, 60 L. ed. — 36 Sup. Ct. Rep. 558, reversing 167, N. C. 433, 83 S. E. 849; Wilson v. Grand Truck R. Co. — N. H. —, 97 Stl. 981.

"Under the Federal Employers' Liability Act an employer is not answerable for injuries received by an employee from defects or insufficiencies in cars, engines, appliances, machinery, tracks, roadbeds, work boats, wharves or other equipment which are not attributable to negligence. Seaboard A. L. R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. St. Rep. 635, L. R. A. 1915 C. 1, Ann Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494."

"Under the Federal Employers' Liability Act a carrier's liability depends on negligence, and the evidence must establish actionable negligence with a reasonable certainty before there can be a recovery for the death of an employee." Hull Virginian R. Co. — W. Va. —, 88 S. E. 1060.

There can be no recovery under the Federal Employers' Liability Act in the absence of a showing of negligence on the part of the employer.

185 Louisville & N. R. Co. v. Holloway, 163 Ky. 125, 173 S. W. 343; Cincinnati, N. O. & T. P. R. Co. v. Goldstorm, 156 Ky. 410, 161 S. W. 246, S. C. 163 Ky. 42, 173 S. W. 161; Miller v. Michigan C. R. Co., 185 Mich. 432, 152 N. W. 235; Hollingshead v. Detroit, G. H. & M. R. Co., 181 Mich. 547, 148 N. W. 171; Winfield v. New York C. & H. R. R. Co., 168 App. Div. 351, 153 N. Y. Supp. 499, affirmed 216 N. Y. 284, 110 N. E. 614.

"Sine enegligence is the basis of the liability of a carrier under the Federal Employers' Liability Act, there can be no recovery in the absence of a showing of negligence on the part of the defendant or some of its employees. Manson v. Great N. R. Co., — N. D. —, 155 N. W. 32.

In order to recover under the Federal Employers' Liability Act the plaintiff must show that his injuries were caused in whole or in part by the negligence of the defendant carrier, its officers or employees. Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558.

In order to recover under the Federal Employers' Liability Act it must appear that the plaintiff's injury was the result in whole or in part of the negligence of the officers, agents or employees of the defendant, or of some defects or insufficiency in its road or appliances. Long v. Southern R. Co., 155 Ky. 286, 159 S. W. 779.

There can be no recovery under the Federal Employers' Liability Act for injuries received by an employee in the absence of any showing of primary negligence on the part of the employer. Chesapeake E. R. v. Shiflett, 118 Va. 63, 86 S. E. 860.

An employer is not liable under the Federal Employers' Liability Act for an injury to an employee, in the absence of negligence

186 on the part of the former, and a recovery cannot be based on the sole fact that the employee sustained an injury while in the service of the master. Chesapeake & O. R. Co. v. Walker, 159 Ky. 237, 167 S. W. 128.

The Federal Employers' Liability Act does not give a cause of action for injuries not occasioned by negligence, and there can be no recovery under it merely on a showing that at the time of an accident the plaintiff was engaged in interstate commerce. Hobbs v. Great N. R. Co., 80 Wash. 678, 142 Pac. 20, L. R. A. 1915 D. 503.

Before the plaintiff can recover in an action under the Federal Employers' Liability Act, he must allege and prove some negligence towards him on the part of the defendant, and his action will fail where there is a total absence of proof of such fact. Kentucky & T. R. Co. v. Hinton, 167 Ky. 516, 180 S. W. 831.

No right of action existed under the Federal Employers' Liability Act of 1906 unless negligence on the part of the defendant was shown. Missouri, K. & T. R. Co. v. Poole, 104 Tex. 36, 133 S. W. 239, reversing — Tex. Civ App. —, 123 S. W. 1176.

Negligence will not be inferred in an action based on the Federal Employers' Liability Act, from proof of facts and circumstances which are just as consistent with due diligence as with some theory

of negligence. Hull & Virginian R. Co., — W. Va. —, 88 S. E. 1060."

Negligence as Proximate Cause.

There can be no recovery under the Federal Employers' Liability Act unless the injury or death was the proximate result of the negligence of the defendant.

Smith v. I. C. R. R. Co., 200 Fed. 533.

187 The common law defense of assumed risk was not abolished by the Federal Employers' Liability Act and is available notwithstanding the state statute on the subject.

"A state statute abolishing the defense of assumption of risk in action for injuries attributable to defective appliances furnished railway employees is not applicable to an action under the Federal Employers' Liability Act. Seaboard A. L. R. R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494.

A state statute has no bearing on the issue of an assumed risk in an action predicated on the Federal Employers' Liability Act, for injuries received by an employee while engaged in interstate commerce. Knapp v. Great N. R. Co., 130 Minn. 405, 153 N. W. 848.

A state statute abolishing the defense of assumption of risk in actions for injury to or the death of railway employees, does not apply to a suit prosecuted under the Federal Employers' Liability Act. Texas & P. R. Co. v. White, — Tex. Civ. App. —, 177 S. W. 1185.

A state statute declaring that a railway employee's knowledge of the defective or unsafe condition of the ways or appliances of an employer shall not be a defense to an action for injuries resulting therefrom, is not applicable to a suit based on the Federal Employers' Liability Act, since the latter law establishes a different rule. Southern R. Co. v. Jacobs, 116 Va. 189, 81 S. E. 99, affirmed on other grounds, 241 U. S. 229 L. ed. —, 36 Sup. Ct. Rep. 588.

The violation by a carrier of a state statute relating to the guarding of cog wheels was held, in an action founded on the Federal
188 Employers' Liability Act, not to relieve an injured employee of assumption of risk of working about such unguarded wheels. Lauer v. Northern Pac. R. Co., 83 Wash. 465, 145 Pac. 606.

An experienced blacksmith was held, in an action based on the Federal Employers' Liability Act, not to have assumed the risk of injury from using a power grindstone with a hole in the grinding face which made its use dangerous, although he was aware of the defect, where the defendant was guilty of a violation of a state law relative to the use of defective machinery. Opsahl v. Northern P. R. Co., 78 Wash. 197, 138 Pac. 681, overruled 83 Wash. 465, 145 Pac. 606."

What Law Governs.

There can be no recovery under a state law for injuries received by a railway employee while engaged in interstate commerce, since the remedy given by the Federal Act is exclusive.

Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, affirming 180 Ill. App. 511; Oliver & Northern P. R. Co., 196 Fed. 432; Armbruster v. Chicago, R. I. & P. R. Co., 166 Ia. 155, 147 N. W. 337; Jones v. Charleston & W. C. R. Co., 98 S. C. 197, 82 S. E. 415; St. Louis, S. F. & T. R. Co., — Tex. Civ. App. —, 149 S. W. 1178.

A widow cannot recover in an action under a state law for the benefit of herself and children for the death of her husband who was killed while employed in interstate commerce, although the Federal Employers' — Act is not declared on. Rich v. St. Louis & S. F. R. Co., 166 Mo. App. 379, 148 S. W. 1011.

189 The plaintiff cannot recover for the death of an employee in an action under a state statute in the individual names of the surviving beneficiaries, where the evidence shows that the decedent was engaged in interstate commerce when he was killed since the action is governed by the Federal Employers' Liability Act. Kansas City, M. & O. R. Co. v. Pope, — Tex. Civ. App. —, 153 S. W. 163.

It is error to submit to the jury under a state law an action for the death of an employee who was killed while engaged in interstate commerce. Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, — L. ed. —, 36 Sup. Ct. Rep. 185, affirming 96 Neb. 87, 146 N. W. 1024, S. C. 94 Neb. 317, 143 N. W. 220.

There can be no recovery under a state statute for the death of an employee while engaged in interstate commerce as the result of the negligent operation of an interstate train, since a recovery, if permissible at all, must be under the Federal Employers' Liability Act. Illinois C. R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

There can be no recovery under a state law for the benefit of a non-dependent relative of a deceased railway employee who was killed while engaged in interstate commerce, since the exclusive remedy is under the Federal Employers' Liability Act, which cannot be pieced out by state laws. Jones v. Charleston & W. C. R. Co., 98 S. C. 197, 82 S. E. 415.

A surviving dependent parent cannot recover under the state statute for the death while engaged in interstate commerce, of a son who left a widow and surviving children, since the right to recover is governed exclusively by the Federal Employers' Liability Act. St. Louis S. F. & T. R. Co. v. Geer, — Tex. Civ. App. —, 149 S. W. 1178.

There can be no recovery in an action under state law brought by widow in her own name for the death of her husband
190 while in the employ of the railway company, when the evidence shows that at the time he was killed he was engaged in

interstate commerce, since the Federal Employers' Liability Act, although not pleaded by the defendant, controlled. Giersch v. Atchinson T. & S. F. R. Co., — Okla. —, 158 Pac. 54.

A substantive right or defense arising under the Federal Act cannot be lessened or destroyed by a rule of practice of a state court.

N. & S. R. Co. v. Ferrelee, 238 U. S. 269, — L. ed. 269

In the case of Laura Staley, Admx. v. I. C. R. Co. L. R. A. (N. S.) 1916 A. 450, it was held that the Federal Employers' Liability Act covers the entire field of compensation for injury to employees in interstate commerce, and in the opinion in that case the court used the following language:

"The field of legislation that was being discussed in the electric headlight case was not a liability for injury to an employee while engaged in interstate commerce, but whether the subject of electric headlights was in the field already covered by Federal legislation as to safety appliances. The question of the Federal Employers' Liability Act was not considered or touched upon in that case. In none of the decisions cited and relied on by the counsel for plaintiff in error was anything said that in any way limited or modified the doctrine laid down in the decisions heretofore considered, that Congress, by the Federal Employers' Liability Act, intended to occupy the field of employers' liability to employees for all injuries occurring on railroads while engaged in interstate commerce. Under those decisions the conclusion is inevitable that in a suit to recover for an injury on a railroad, occurring while the employer and employee were engaged in interstate commerce, the Federal Employers' Liability Act Alone would control and could not be pieced
191 out or supplemented by any state statute. The decedent having been engaged at the time of his death in interstate commerce, the recovery must be had, if at all, under and subject to the provisions of the Federal Employers' Liability Act."

A state statute creating a presumption of negligence from injuries caused by the running of a train does not apply to an action based on the Federal Employers' Liability Act.

A state statute which raises a presumption against a carrier in certain cases upon proof of injury from its locomotives or cars, does not apply to an action in a state court under the Federal Employers' Liability Act.

L. & N. R. Co. v. Kemp, 79 S. E. (Ga.) 558.

A state statute making proof of defects in appliances prima facie evidence of the negligence of the defendant in an action for injuries received by an employee does not apply to an action for injuries sustained while engaged in interstate commerce, since such statute was superseded by the Federal Employers' Liability Act.

S. C. & C. St. R. Co. v. Finan, 155 S. W. 742.

It will thus be seen by reference to authorities cited supra, that the Florida court is not the only Supreme Court which holds that such a state statute is not to be applied in cases founded upon the

Federal Employers' Liability Act, and we have failed to find a contrary holding in any court but that of Mississippi.

Under the opinion of the court in the instant case, it would seem to be the view of the court, that in all cases founded upon the Federal Employers' Liability Act which are tried in Mississippi, Section 1985 of the Mississippi Code of 1906 is to be added to, and
192 made a part of the Federal Act. When that is done, the Federal Act as to the liabilities imposed by it will in many cases have a different result in Mississippi from the result in other states which have no prima facie statutes as well as in the states which have them but hold that they are superseded by the Federal Act. Conceding that Sec. 1985 of the Mississippi Code of 1906 is a rule of evidence and as such that it is applicable in cases tried in the courts of Mississippi which are founded upon the Federal Employers' Liability Act, the court in the case under consideration, has given it an effect different to that which is authorized by this court in the case of A. F. S. Ry. Co. v. Daniel, 66 So. Rep. p. 732, where the court uses the following language:

"It is not necessary under this statute, any more than it was before the enactment, that the proven facts and circumstances should exonerate the defendant—that is, that it should appear therefrom, that he had acted with due care on the occasion in question—before he can be relieved from liability. On the contrary, under the statute, as before its enactment, when the facts and circumstances have been ascertained, the jury must be able to say therefrom that the defendant was guilty of negligence; otherwise he cannot be held liable."

It is held by many adjudications, that there can be no recovery under the Federal Employers' Liability Act in the absence of a showing of negligence on the part of the employer, which contributed to the injury or death of the employee.

N. & W. R. Co. v. Short, 188 S. W. (Ky.) 786.
Gaines v. G. T. R. Co. 159 N. W. (Mich.) 542.
Palmer v. W. F. & N. R. Co. 159 Pac. (Okla.) 1115.
Going v. N. & W. R. Co. 89 S. E. (Va.) 914.

193 Assumption of Risk Under Federal Statute.

By the application of the state statute in this case and by the conclusive effect given to it, the defendant was deprived of any defense as to the assumption *to* the risk. This defense is not available under the state law, but it applies with its full common law force in actions under the Federal Employers' Liability Act. The undisputed facts in the record show that the deceased gave the signal for the starting of the train and after it began to move he undertook to board the moving train and "missed his hold" and was thereby injured. The risk of such an accident was assumed.

Young v. N. & W. R. Co. 188 S. W. (Ky.) 621.

By virtue of the state statute alone the court says that liability was

conclusively established to such an extent as to preclude the necessity of considering any of the many errors assigned.

It has been held (Kolasiuski v. Chicago M. & St. P. R. Co., 159 N. W. (Wis.) 563, that a state statute relating to the safe place doctrine is not applicable to an action founded upon the Federal Act.

It is also held, (C. R. I. & P. R. Co. v. Jackson, 160 Pac. (Okla.) 736, that a state constitutional requirement for the submission of the question of assumed risk to the jury as a question of fact, does not apply to actions founded on the Federal Employers' Liability Act.

In an action under the Federal Employers' Liability Act, no presumption of negligence arises from evidence that the plaintiff's injury was due to the running of one of the defendant's trains.

Landrum v. W. A. R. Co. 90 S. E. (Ga.) 710.
Ivey v. L. & N. R. Co. 89 S. E. (Ga. App.) 629.

194 In the case of M. J. & K. C. R. Co. v. Turnipseed, 219 U. S. p. 35, Section 1985 of the Mississippi Code of 1906 was under review by the Supreme Court of the United States and it was there called a statute prescribing a rule of evidence. But the court in that case was dealing with the statute only with reference to the constitutional right of the state of Mississippi to enact it. It was there declared not to be in violation of the provisions of the 14th Amendment to the constitution of the United States. It seems to be conceded that unless the statute is a mere rule of evidence or of procedure and if in fact it is a statute imposing liability, it could not be applied in a case founded upon the Employers' Liability Act, because that Federal Law has superseded all state statutes imposing liability, and the rights and liabilities of the parties are to be measured alone by the Federal statute. The effect of this statute as applied in the instant case, cannot be evaded or disguised simply by calling it a rule of evidence. It has been construed by the court in this case as a statute imposing liability, for the court says that if the case is to be determined by the Federal statute alone there should have been a peremptory instruction in favor of the defendant, whereas, applying the statute, there should have been a peremptory instruction to find for the plaintiff. Without this state statute, the court says that on the record in this case there was no liability. With the aid of this state statute, the court says that the liability is absolute and fixed. And yet it is denominated a rule of evidence and not a statute of liability. If indeed it is a mere rule of evidence, or of procedure the rule as enforced in the instant case and as construed by the court, imposes liability where none existed under the
195 Federal Act and imposes liability under the Federal Employers' Liability Act in the State of Mississippi, in a state of case where no liability would be imposed under the same Federal Act in Florida, Georgia, Kentucky, Kansas, Louisiana, or for that matter, where no liability could be imposed in any other state in the Union so far as the adjudicated cases show. To state it in a different way, by calling Section 1985 of the Mississippi Code of 1906 a "rule

of evidence" and by adding it to the Federal Act in all cases tried in Mississippi, the Federal Employers' Liability Act is given a different effect in Mississippi, and recoveries may be had under it in Mississippi, when under the same evidence no recovery could be had anywhere else in the United States.

Inapplicability of Section 1985, Mississippi Code of 1906.

As to the inapplicability of Section 1985 of the Mississippi Code of 1906 to the case at bar, or to any case founded upon the Employers' Liability Act, we respectfully call the attention of the court to the recent case of Erie Railroad Company v. Amy L. Winfield, decided by the Supreme Court of the United States after reargument on May 21, 1917, reported in the advance sheets of July 21st, 1917, 61 U. S. L. ed. p. 553. From the opinion of the court in that case we quote as follows:

"The questions presented for decision are these: First, whether the Federal Act is regulative of the carrier's liability or obligation in every instance of the injury or death of one of its employees in interstate commerce, or only in those instances where there is
196 casual negligence for which the carrier is responsible. Second, whether the facts proved sustain the conclusion that the deceased was employed in interstate commerce at the time of the injury. Third, whether by reason of the state statute, the carrier became bound contractually to make compensation in this instance, even though it cam- within the Federal Act.

The first question is fully considered in New York C. R. Co. v. Winfield, the opinion in which has just been announced, 244 U. S. —, ante, 546, 27 Sup. Ct. Rep. 546, and it suffices here to say that, for the reasons there given, we are of the opinion that the Federal Act proceeds upon the principle which regards negligence as the basis of the duty to make compensation, and excludes the existence of such a duty in the absence of negligence, and that Congress intended the Act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the states, as respects interstate commerce, and in that field it is both paramount and exclusive."

And further:

"The third question requires some notice of the New Jersey Statute. It consists of two parts. One conforms to the principle which regards negligence as the basis of liability, and excludes liability in the absence of negligence. In its details, however, that part differs materially from the Federal Act. The other conforms to a different principle which rejects negligence as a basis of liability and requires compensation to be made by the employer whenever the injury or death of the employee is an incident of the service in which he is
employed. This part is described as 'elective,' and is not to
197 be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby and to surrender 'their rights to any other method, form or amount of com-

pensation or determination thereof.' Respecting the mode of manifesting such an agreement or the contrary, it is provided that every contract or hiring 'shall be presumed to have been made' with reference to this part of the statute, and, unless the contract or a notice from one party to the other contains 'an express statement in writing' to the contrary, it 'shall be presumed' that the parties 'have agreed to be bound' by this part of the statute. There was no express agreement in this instance, and there is no basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here, and this for the reason that by the Federal Act the entire subject as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of the state laws. It is beyond the power of any state to interfere with the operation of that Act, either by putting the carrier- and their employees to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption. The third question, therefore, must be answered in the negative."

In the case of New York C. R. Co. v. Winfield, cited in the Court's opinion supra the question referred to is disposed of by the use of the following language:

198 "It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it is also settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. Congress acted upon the subject in passing the Employers' Liability Act, and the extent to which that Act covers the field is the point in controversy. By one side it is said that the Act, although regulating the liability or obligation of the carrier and the right of the employee where the injury results in whole or in part from the negligence attributable to the carrier, does not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by the state laws; and by the other side it is said that the Act covers both classes of injuries and is exclusive as to both. The state decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in the Winfield v. Erie R. Co. 88 N. J. L. 619, 96 Atl. 394, hold that the act relates only to injuries resulting from negligence, while the California court in Smith v. Industrial Acci. Commission, 26 Cal. App. 560, 147 Pac. 600, and the Illinois Court in Staley v. Illinois Central R. Co. 268 Ill. 356, L. R. A. 1916 A, 450, 109 N. E. 342, hold that it has a broader scope and makes negligence a test,—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury. In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging in interstate commerce

199 shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line. Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 579, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914. It was largely in recognition of this the Federal Employers' Liability Act was enacted by Congress. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 51, 56 L. ed. 327, 346, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. It was drafted and passed shortly after a message from the President advocating an adequate national law covering all such injuries, and leaving to the action of the several states only the injuries occurring in intrastate Employment. Cong. Rec. 60th Cong. 1st Sess. 1347. And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad- in interstate commerce from the operation of varying state laws, and to apply them to a national law having a uniform operation throughout all the states. House Report No. 1386 and Senate Report No. 460, 60th Cong. 1st Sess. Thus, in the House Report it is said 'It (the bill) is intended in its scope to cover all commerce to which the regulative power of Congress extends * * * by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. * * * A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will
200 create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states.'

True, the Act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the Act conforms to this principle, and no part points to any purpose to leave the state free to require compensation where the Act withholds it."

"By declaring in Section 1 that the carrier shall be liable in damages for any injury to the employee 'resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track' (35 Stat. at L. 65 Chap. 149, Comp. Stat. 1916, Section 8657), etc., the Act plainly shows, as was expressly held in Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, L. R. A. 1915 C. 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915, B, 475, 8 N. C. C. A. 834, that it was the intention of Congress to make negligence the basis of the employee's right to dam-

ages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence, or that of its officers, agents, or other employees. The same principle is seen also in Section 3, which requires that where the carrier and the employee are both negligent, the recovery shall be diminished in proportion to the employee's contribution to the total negligence; and in Section 4, which regards injuries arising from risks assumed by the employee as among those for which the carrier should not be made to respond. The Committee reports upon the bill show that this principle was adopted deliberately, notwithstanding there were those within and without the committees who looked with a greater favor upon a different principle which puts negligence out of view and regards the employee as entitled to compensation wherever the injury is an incident of the service in which he is employed. A few years after the passage of the Act a legislative commission drafted, and the Committee on the Judiciary in the two Houses of Congress favorably reported a bill substituting the latter principle for the other (Senate Report No. 553, 62d Cong. 2d Sess. House Report No. 1441, 62d Cong. 3d Sess.), but that bill did not become a law.

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That the Act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in Missouri K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. St. Rep. 135, Ann. Cas. 1914 B, 134 and other cases, it is pointed out that the subject which the Act covers is 'the responsibility of interstate carriers by railroad to their employees injured in such commerce'; in Mich. C. R. Co. v. Vreland, 227 U. S. 59, 66, 67, 57 L. ed. 417, 419, 429, 33 Sup. Ct. Rep. 1 (2 Ann. Cas. 1914 C. 176, it is said that 'we may not piece out this Act of Congress by resorting to the local statutes of the state of precedure or that of the injury'; that by it 'Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce,' and that it is 'paramount and exclusive'; in North Carolina R. Co. v. Zachary, 232 U. S. 248, 256, 58 L. ed. 591, 594, 34 Sup. Ct. Rep. 305 Ann. Cas. 1914 C. 159, 9 N. C. — A. 199, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce, the Federal Act governs to the exclusion of the State law; in Seaboard Air Line R. Co. v. Horton, supra, pp. 501, 503, it is said that not only Congress intended 'to exclude responsibility of the carrier to its employees' in the absence of negligence, but that it is not conceivable that Congress 'intended to permit the legislature of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer'; and in Wabash R. Co. v. Haynes, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224, it is said: 'Had the injury occurred in interstate commerce, as was alleged, the Federal Act undoubtedly would have been controlling, and a recovery could not

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have been had under the common or statute law of the state; in other words, the Federal Act would have been exclusive in its operations, not merely cumulative (citing cases). On the other hand if the injury occurred outside of interstate commerce, the Federal Act was without application and the law of the state was controlling.'

The Act is entitled, 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases,' and the suggestion is made that the words 'in certain cases' require that the Act be restrictively construed. But we think that these words
203 are intended to do no more than to bring the title into reasonable accord with the body of the Act, which discloses in exact terms that it is not to embrace all cases of injury to the employees of such carriers, but only such as occur while the carrier is engaging and the employee is employed in 'commerce' between any of the several states, etc. See Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

Only by disturbing the uniformity which the Act is designed to secure and by departing from the principle which it is intended to enforce can the several states require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no state is at liberty to thus interfere with the operation of a law of Congress. As before indicated it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the Act, for, as is said in Prigg v. Pennsylvania, 16 Pet. 539, 617, 10 L. ed. 1060, 1089, 'if Congress have a constitutional power to regulate a particular subject and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as direct provisions made by it.' Thus, the Act is as com-
204 prehensive of injuries occurring without negligence as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words it is a regulation of the carrier's duty or obligation as to both. And the reasons which operate to prevent the states from dispensing with compensation where the Act requires that it shall equally prevent them from requiring compensation where the Act withholds or excludes it."

The construction which the court in this case has given to Section 1985 of the Code of Mississippi, makes the statute a statute of liability and not merely a statute of evidence and renders said statute unconstitutional as taking property without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States. In the instant case the court holds that the failure of the defendant to produce an eye witness to the injury renders the defendant liable. While the defendant could not produce an eye-

witness to the injury, the defendant did produce evidence of all the facts and circumstances of the injury, and did prove that its train was prudently and carefully operated, that its track and roadway were in safe condition, and that its train was not moved at an excessive rate of speed, and that the plaintiff himself gave the signal to proceed, and was in position to have gotten on the train before it got under way, or before the speed had been increased, and that he was found on the track after the train had left and that he explained his injury with the statement that he had "missed his hold." Assuming that the Mississippi statute applied to this case, upon proof of this kind the statute disappears from the case, and the case was to be tried upon the ordinary principles of law applicable to such
205 cases. This statute of Mississippi has been before the Supreme Court of the United States and was held constitutional on the ground that it did not create a presumption of liability, but merely an inference of negligence. The construction given the statute in the instant case, however, does create a presumption of liability. In the case of M. J. & K. C. R. R. Co. v. Turnipseed, 219 U. S. 35, the Supreme Court said relative to this statute:

"The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When it is done the inference is at an end, and the question of negligence is one for the jury, upon all of the evidence. In default of such evidence, the defendant, in a civil case must lose, for the prima facie case is enough as a matter of law. The statute does not, therefore, deny the equal protection of the law, or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference."

In the instant case the defendant introduced evidence to contradict the inference of negligence, that is, the defendant introduced evidence showing that its track and roadway were in safe condition, that its equipment was in proper repair and condition and its train was properly and carefully operated. Having done that, then in the words of the Supreme Court of the United States, "when that is done, the inference is at an end and the question of negligence is one for the jury upon all the evidence."

As we understand the opinion of this court the proposition which we are now advancing is met by the statement that the Mississippi statute as applied in this case is merely a rule of evidence and
206 not a rule of substantive law. But a rule is not a rule of evidence merely from so denominating it, when in point of fact its effect is a rule of substantive law. This very proposition has been decided by the Supreme Court of the United States in Central Vermont R. Co. v. White, 238 U. S. 507. That was a case under the Federal Employers' Liability Act. Under the Vermont Law, it appeared that it was incumbent upon the plaintiff not merely to show negligence of the defendant, but also that the plaintiff himself was free from contributory negligence, and the Vermont Court held that the duty of the plaintiff to show freedom from contributory negligence under the Vermont law had no application in a case under the

Federal Employers' Liability Act, and this ruling was sustained by the Supreme Court of the United States. In that case the Supreme Court said:

"There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought (M'Neil v. Holbrook, 12 Pet. 89, 9 L. ed. 1011). But matters of substance and procedure must not be confounded because they happen to have the same name."

And likewise in the same case, the Supreme Court said:

"As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those similar instances follow their own practice even in the trial of suits arising under the Federal law.

207 But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those states the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal Courts have enforced that principle even in the trials in states which hold that the burden is on the plaintiff. Washington & C. R. Co. v. Gladmon, 15 Wall. 401 (1), 407, 408, 21 L. ed. 114-116; Hough v. Texas & P. R. Co. 100 U. S. 225, 25 L. ed. 617; Inland & Seaboard Coasting Co. v. Tolson, 138 U. S. 551 (4) 557, 35 L. ed. 270, 272, 11 Sup. Ct. Rep. 653; Washington & C. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner) 147 U. S. 581, 37 L. ed. 288, 13 Sup. Ct. Rep. 557; Hemingway v. Illinois C. R. Co. 52 C. C. A. 477, 114 Fed. 843; Congress in passing the Federal Employers' Liability Act, evidently intended that the Federal Statutes should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in Seaboard Air Line R. Co. v. Moore, 228 U. S. 434, 57 L. ed.

208 907, 33 Sup. Ct. Rep. 580. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof."

We insist, therefore, first that the Mississippi statute, (Section 1985 of the Code of Mississippi) cannot be availed of at all, in a case falling under the Federal Employers' Liability Act. Second, if said statute can be availed of in a case falling under the Federal

Employers' Liability Act, the construction given by the court of that statute in this case operates to deprive this defendant of its property without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States, and that said statute as so construed is unconstitutional and void.

The rule adopted by this court in this case clearly would impose upon a railroad company liability for the death of every brakeman who falls from a train and is killed, even though the train was prudently and carefully operated, and even though there was no negligence whatever in its operation, provided the defendant cannot produce a witness who saw the accident and can tell just how it occurred.

Error in Instruction as to Contributory Negligence—Damages.

Assuming that the case is one of liability, the case should be reversed on the ground of the error in the charge of the court as to the effect to be given contributory negligence. The court instructed the jury that in the event that both the deceased and defendant were guilty of negligence "the jury should diminish the amount of damages shown by the evidence to have been sustained, if any,
209 in proportion to the amount of negligence attributable to the defendant, if any."

The Act provides "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." While the court has ordered a remit-itur in this case, yet the defendant is entitled to a trial by jury and is entitled to have the damages diminished by the jury in proportion to the negligence of the plaintiff's intestate. This it has not had and for that reason the cause should be reversed. The Federal Employers' Liability Act in terms provides that the damages shall be diminished by the jury. In the instant case the defendant has a substantive right to insist that the negligence against the defendant should be proven by witnesses and not inferred by a state statute, and also has a substantive right to insist that in the reversal of this case that it should have a correct charge on the doctrine of contributory negligence, and defendant also has a substantive right to insist that the reversal of this case shall not be a partial one merely to ascertain damages, but that the reversal should be upon the whole case.

In the case of Norfolk Sou. R. Co. v. Ferrebee, 238 U. S. 269, the Supreme Court said:

"The company then brought the case here by writ of error, in which it contends that it was error for the Supreme Court to grant a partial new trial in which the question of damages only could be considered, inasmuch as the Employers' Liability Act entitles the defendant in all cases to prove contributory negligence in mitigation of damages. On the other hand, the defendant in error contends that the question as to whether there should have been a partial new trial was a matter of procedure, to be governed by the practice of the State of North Carolina.

210-12 But a substantive right of defense arising under the Federal law cannot be lessened or destroyed by a rule of practice.

Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury."

We do not argue the other assignments of error as they have been sufficiently argued in the original brief, nor do we intend to waive them. We specially insist upon all of them.

Finally, if upon reconsideration the court should be of the opinion that no error had been committed, we respectfully suggest that it would be proper for the court, if the court desires to elaborate the opinion and state definitely the views of the court on the several assignments of error, so that upon review by the Supreme Court of the United States that court would have stated in full, the views of this court on the several assignments of error.

At present all the assignments of error are disposed of, as we understand the opinion, on the ground that no eye-witness of the fatal injury to plaintiff's intestate was produced, and as plaintiff's intestate was injured by a moving train the defendant's liability follows as a matter of law, under Section 1985 of the Mississippi Code of 1906.

Respectfully submitted,

MAYES, WELLS, MAY & SANDERS,
Attorneys for Defendant.

C. N. BURCH,
RATCLIFF & KENNEDY,
Of Counsel.

We certify that we have mailed postage prepaid, a copy hereof to Reily & McCall, Attys. for appellee at Meridian, Miss., this July 26th, 1917.

MAYES, WELLS, MAY & SANDERS,
Attorneys for Appellant.

213 Saturday, A-gust 4th, 1917.

We, the undersigned Judges of the Supreme Court of Mississippi hereby certify that we have read and considered the suggestion of error and briefs in the case of Yazoo & Mississippi — Railroad Company vs. Clara J. Mullins, and have determined to overrule the suggestion of error.

(Signed) J. B. HOLDEN.
E. O. SYKES.

214 *Opinion of the Court.*

Division A.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

vs.

MRS. CLARA J. MULLINS, Administratrix.

HOLDEN, *J.*:

This is an appeal from a judgment for $20,000 obtained by the appellee in the circuit court of Adams county against the appellant railroad company as damages for the injury and death of James D. Mullins, a flagman in the employ of the appellant railroad.

The facts as to the injury and death, in so far as they are material to the decision of this case, are briefly these: Mullins was a flagman employed in the operation of one of appellant's interstate freight trains, consisting of about 34 cars, which had stopped at about 2:00 a. m. at Harriston and there did some switching. When the train was ready to proceed north from Harriston at 4:00 a. m. it was signalled by Mullins and a brakeman to leave and it left the station at a rapid rate of speed. Mullins when last seen before his injury was standing along side of the train on the east side of the main track. Shortly after the train had left Harriston, Mullins was found lying immediately east of the main track with his arm on the rail, completely crushed from the shoulder to the fingers. He stated to the persons who found him that he had "missed his hold," but made no other explanation as to how the injury occurred before he died in the hospital about nine hours after the injury. No witness testified as to how the injury happened.

The suit was brought under the Federal Employers' Liability Act and was based upon the alleged negligence of the Railroad in not furnishing safe ways and appliances for the use of deceased,
215 and also that the engineers (double-header) were negligent in starting the train at a dangerous rate of speed from the station of Harriston, causing the deceased to fall when he attempted to get on the train. The plaintiff at the trial below proved the injury to deceased was inflicted by the running of the cars of appellant railroad, and also introduced testimony tending to prove, by circumstances, physical condition and inferences, the allegations of the declaration as to defective and unsafe ways and appliances and the dangerous speed of the train. When the plaintiff rested, a peremptory instruction to find for defendant was asked and refused by the court. The appellant railroad introduced its testimony showing that the train was properly and safely equipped and that there were no defective ways or appliances, and that the train was not negligently handled; and if then again requested a peremptory instruction in its favor, which was refused, and the case was submitted to the jury; a verdict of $20,000 was returned in favor of the plaintiff.

The appellant assigns and urges several errors of the lower court. The main contention urged for reversal is that the peremptory instruction asked by the railroad should have been granted because the appellee failed to show any negligence on the part of the railroad and that at all events, appellee did not prove that the negligence of appellant proximately caused the injury of the deceased. This contention may be correct and would justify a reversal of the judgment if the appellee had no other ground upon which to rest the judgment. But it is unnecessary for us to pass upon this question as our prima facie statute, section 1985 of the Code of 1906, if applicable to this case and comes to the aid of appellee as "a present help." The whole evidence in the case shows conclusively
216 that the injury was inflicted by the running of the cars of appellant, and the burden was upon the railroad to explain the injury and show how it occurred. This was not done, and it appears that it could not be explained at the trial as no person knew how it occurred. The brief of counsel for the appellant contains this statement of fact:

"No person seemed to know just how the accident occurred. At all events, no witness could be produced or was produced, who saw the actual infliction of the injury, but the testimony did show that the injured flagman stated that he had received his injury by reason of the fact that he had 'missed his hold.' As to when he 'missed his hold' or as to what part of the train he was occupying at the time or as to whether or not it was before or after he boarded the train, or as to what caused him to 'miss his hold' and as to what he had hold of, the record is entirely silent and no witness could be produced who could testify."

Therefore, the plaintiff having proved a case within the prima facie statute, and the defendant railroad having failed to explain the injury, its negligence and liability conclusively appeared as a matter of law, and the circuit judge should have peremptorily instructed the jury to find for the plaintiff; and this being true, it follows that appellant cannot complain because the question of negligence vel non was submitted to the jury. Alabama etc. R. Co. v. Thornhill, 106 Miss. 387. The jury found for the plaintiff, thereby doing what the court should have instructed it to do. The error of the lower court in instructing the jury that our prima facie statute did not apply in the case, did not injure the appellant, but was favorable to it
217 in permitting the case to go to the jury with the chance of verdict for appellant.

Counsel for appellant urges that our prima facie statute, sec. 1985, Code of 1906, is not applicable in the case before us because this suit is governed by the Federal Employers' Liability Act, and that the prima facie statute is not a rule of evidence, but that it is a substantive law and gives a substantial right in conflict with the Federal Act. It is argued that the prima facie statute is a state law which in effect creates a liability by virtue of the presumption of nelgigence from the infliction of injury by the running of cars, and that this statute conflicts with the Federal Act in matters of substance affecting liability, and is not a mere rule of evidence. The

recent case of Louisville etc. R. Co. v. Rhoda (Fla.) 74 South. 19, is cited as authority for the position taken by the appellant. We have reviewed this case and several others cited by counsel, and, without entering into a discussion of the holding in the Florida case, we are clearly of the opinion that our prima facie statute is not in conflict with the Federal Act, but that it is a rule of evidence, the lex pori, and our state courts having conclusive jurisdiction with the Federal courts of causes arising under the Federal Act, the law of the form must govern in the trial of such cases. The authorities cited by counsel fail to convince us that our beneficient prima facie statute is inapplicable to cases under the Federal Act. We therefore announce here again that the statute, sec. 1985, Code of 1906, is applicable as a rule of evidence in the courts of our state, regardless of whether the cause of action arises under the Federal Act or the state law.

218-19 But the appellant contends here that if the prima facie statute can be successfully invoked in this case, then the lower court erred in trying the case upon a different theory, that is, that the lower court tried the case and submitted it to a jury upon the theory that the plaintiff in the lower court had shown negligence on the part of the defendant as the proximate cause of the injury, and that she did not rely for recovery upon the prima facie statute. This position is untenable, for the reason that the plaintiff below did not cause the error made by the lower court in excluding the prima facie statute from consideration in the case, but the instruction telling the jury that the prima facie statute did not apply was granted at the instance of the defendant Railroad Company. Furthermore, the plaintiff below asked and obtained instructions not based upon any particular statement of facts in the case, but the court simply announced by instructions the proposition that if the jury believed that the defendant was guilty of negligence which caused the injury, they should find for the plaintiff. This theory proceeded upon by the plaintiff, did not preclude her from receiving the benefit of our prima facie statute. However, as we have said before, the appellant cannot complain because the case was submitted to the jury on the question of negligence vel non, as the court should have peremptorily instructed the jury, under all the testimony, to find for the plaintiff; and the only question that should have been left to their determination was the amount of the recovery. Therefore, as the jury did that which the court should have instructed it to do, and as there could have been but one verdict as to liability, the submission of the case to the jury and the instructions complained of by the appellant, could not affect the finding of liability in the case. Therefore there is no error in the finding of liability against the appellant.

220 This suit being under the Federal Act, the recovery of damages in the case is limited to the pecuniary loss to the mother, and the damages for the pain and suffering of the deceased from the time he was injured until his death. It will be observed that the mother was 60 years of age, with a life expectancy of about 14 years, and it appears from the testimony that the deceased Mul-

lins, her son, was contributing about $50 per month to her support. This contribution to her support and the damages suffered by the deceased on account of the pain and suffering experienced by him, is the measure of her recovery in the case. The deceased lived about nine hours after he was injured, and suffered more or less during that time. The jury returned a verdict of $20,000, and it is urged by the appellant here that this amount is grossly excessive.

After a most careful consideration of this latter contention, we think it is well grounded, and that the verdict is excessive, under the law and facts in the case. It is easy for us to calculate the pecuniary loss to the mother at $50 per month for 14 years, her life expectancy, when paid in a lump sum, but it is rather difficult for us to measure with reasonable certainty the amount of recovery for the *paid* and suffering of the deceased between the time that he was injured and his death. But we think, taking the most favorable view of the appellee's case, from the testimony in the record, and following the cold rule of the Federal law, the recovery should not be allowed to stand for more than $12,500, the maximum limit. If the
221 appellee will enter a remit-it*tur* for $7,500, redusing the judgment to $12,500, the judgment will be affirmed; otherwise, it will be reversed and remanded for a new trial on the question of the amount of damages only.

222 In the Supreme Court of the State of Mississippi.

No. 19420.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

vs.

MRS. CLARA J. MULLINS, Administratrix.

Petition for Writ of Error from the United States Supreme Court to the Supreme Court of Mississippi.

To the Honorable Sydney Smith, Chief Justice of the Supreme Court of Mississippi:

The Yazoo and Mississippi Valley Railroad Company, E. H. Ratcliff and L. T. Kennedy, petitioners, present this their petition for a writ of error to the Supreme Court of the United States in the above entitled cause, and respectfully show that on the 2nd day of July, 1917, the Supreme Court of Mississippi rendered a final judgment for the principal sum of Twelve thousand five hundred dollars with accumulated interest at six per cent per annum on said judgment from the 3rd day of April, 1916, to the date of the final judgment in the Supreme Court of the State, together with the costs, in favor of Mrs. Clara J. Mullins, Administratrix, the appellee in the above cause, and against the Yazoo and Mississippi Valley Railroad Company, the appellant therein, and also against petitioners

E. H. Ratcliff and L. T. Kennedy, sureties on the appeal bond whereby the said case was appealed from the state court of original jurisdiction to the Supreme Court of Mississippi and by its final judgment the Supreme Court of Mississippi awarded execution therein against your petitioners in the above entitled cause wherein

223 your petitioners, the said Yazoo & Mississippi Valley Railroad Company and E. H. Ratcliff and L. T. Kennedy, were defendants and the said Clara J. Mullins was the plaintiff, and your petitioners, E. H. Ratcliff and L. T. Kennedy were sureties as aforesaid, on their co-petitioner's appeal bond.

Your petitioners further show that to the rendition of this judgment of July 2, 1917, a suggestion of error was filed by your petitioners seeking to have the court change the judgment of July 2, 1917, but this suggestion of error was overruled on August 4, 1917, the court thereby on that date, making final the judgment of July 2, 1917, all of which will appear by reference to the record and proceedings in said cause, same being numbered 19420 on the docket and records of the Supreme Court of Mississippi, which last named court is the highest court of the state in which a decision in said suit, or any other, can be had.

Your petitioners claim the right to remove said judgment to the Supreme Court of the United States by writ of error, because the case arose under, and there was brought into question in said cause, the true construction of an Act of Congress commonly known as the Employers' Liability Act, entitled "An Act Relating to the Liability of Common Carriers by Railroads to Their Employees in Certain Cases," approved April 22, 1908, being Chapter 149 of thirty-five statutes at large as amended April 5, 1910, by Chapter 143 thirty-six statutes at large, and acts amendatory thereof, and the Supreme Court of Mississippi denied to petitioners, as we respectfully submit, the rights, privileges and immunities under said acts of Congress in this:

224 The case being one which was brought under the provisions of the Federal Employers' Liability Act and based upon the alleged negligence of defendant in failing to furnish safe ways, and appliances for the use of the deceased employee, and also that the train was started at a dangerous rate of speed, it was conceded that the plaintiff in the court below failed to show any negligence on the part of the defendant railroad company, and therefore necessarily failed to show that any negligence was the proximate cause of the injury to the deceased which caused his death, and it also conceded that the defendant railroad company affirmatively proved that the train was properly equipped and that there were no defective ways and appliances and that the train was not negligently handled. But conceding the proof of all of said facts, at the close of all the testimony in the case, the said Supreme Court of Mississippi, held, that by reason of the saving help of the Mississippi prima facie statute (being Section 1985 of the Mississippi Code of 1906) liability was imposed upon the defendant railroad company by reason of said Mississippi prima facie statute, and that there should have been, by reason of said statute alone, a peremptory instruction directing

a verdict for the plaintiff, thereby adding to the Federal Employers' Liability Act and making a part of same, Section 1985 of the Mississippi Code of 1906, commonly known as the prima facie statute, imposing upon the defendant liability for the death of the plaintiff's decedent, in the absence of any proof of negligence on the part of the defendant and by reason of the application of the Mississippi statute alone; and thereby the said Mississippi Supreme Court failed and refused to hold in accordance with the provisions of the Federal Employers' liability Act, that all state laws regulating the
225 liability of carriers for injuries to or the death of employees, while engaged in interstate commerce, were superseded by the Federal Employers' Liability Act.

And the said Supreme Court of Mississippi denied to there petitioners, as we respectfully submit, the rights, privileges and immunities under said acts of Congress in this:

That it imposed absolute liability on the part of the carrier in the absence of any proof tending to show that plaintiff's decedent came to his death by reason of any negligence on the part of defendant which was the proximate cause of his injury and death, as is required by the Federal Employers' Liability Act, and by reason alone, of the existence and applicability of the Mississippi Statute, Section 1985 of the Mississippi Code of 1906.

And the said Mississippi Supreme Court denied to these petitioners, as we respectfully submit, the right, privileges and immunities under said acts of Congress, in this:

It was held that absolute liability was imposed upon the defendant under the state law, Section 1985 of the Mississippi Code of 1906, for injuries received by and the death of a railway employee while both the plaintiff and the defendant were engaged in interstate commerce and that the remedy given by the federal act was not exclusive.

And the said Supreme Court of Mississippi denied to there petitioners, as we respectfully submit, the rights and privileges and immunities under said acts of Congress in this:

That by the application of the State statute in this case and by the conclusive effect given to it, the said defendant was de-
226 prived of any defense as to the assumption of the risk, this defense being not available under the state law, but applying with its full common law force, in actions under the Federal Employers' Liability Act.

And the said Supreme Court of Mississippi denied to these petitioners, as we respectfully submit, the rights, privileges and immunities under said acts of Congress in this:

That it applied to this case which was based on the Federal Employers' Liability Act Section 1985 of the Mississippi Code of 1906, and placed upon that state statute, a construction which makes the state statute a statute of liability and not merely a rule of evidence and renders said state statute unconstitutional as taking defendant's property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States:

And the said Supreme Court of Mississippi denied to these petitioners, as we respectfully submit, the rights, privileges and immunities under said acts of Congress:

In that it failed and refused to reverse said cause on the ground of an error in the charge of the court of original jurisdiction as to the effect to be given upon the proof of contributory negligence, the court below having instructed the jury that in the event that both the deceased and the defendant, were guilty of negligence, "the jury should diminish the amount of damages shown by the evidence to have been sustained, if any, in proportion to the amount of negligence attributable to the defendant, if any" whereas the federal act provides "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to said employee."

And the said Mississippi Supreme Court denied to there
227 petitioners, as we respectfully submit, the rights, privileges and immunities under said Acts of Congress:

In that the court failed and refused to consider any of the assignments of error upon the disposition of said appeal from the court of original jurisdiction, solely for the reason that the evidence in the case showed that the plaintiff's intestate was injured by a moving train and that the defendant's liability follow*ing* as matter of law, under the provisions of Section 1985 of the Mississippi Code of 1906; whereas your petitioners believe and have insisted and now insist that this suit is based upon the provisions of the Employers' Liability Act, being "An act relating to the liability of common carriers by railroads to their employees in certain cases," and that all state laws regulating the liability of carriers for injuries to, or the death of employees while engaged in interstate commerce, were superseded and suspended by the Federal Employers' Liability Act; and it was prejudicial error to your petitioner, the Yazoo and Mississippi Valley Railroad Company, for the court of original jurisdiction to have refused to direct a verdict in favor of your petitioner and for the said Supreme Court of Mississippi to hold and adjudicate the applicability of the Mississippi state statute Section 1985 of the Mississippi Code of 1906, and to put a construction upon said statute imposing absolute liability, in the absence of any proof of negligence on the part of the defendant and in construing said Mississippi statute as a statute of liability in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; and the said judgment of the Supreme Court of Mississippi denied to this appellant, the

Yazoo and Mississippi Valley Railroad Company, its rights,
228 privileges and immunities under the provisions of said Federal Employers' Liability Act and under the constitution and laws of the United States.

Wherefore, petitioners pray for the allowance of a writ of error with supersedeas, returnable to the Supreme Court of the United States and for citation and supersedeas, especially presenting herewith an assignment of error to be presented and urged in the Supreme Court of the United States, and as in duty bound petitioners will ever pray, etc.

YAZOO & MISSISSIPPI VALLEY R. R. CO.,
E. H. RATCLIFF,
L. T. KENNEDY,
By MAYES, WELLS, MAY & SANDERS,
Their Attorneys.

Let the writ of error, with supersedeas issue as prayed for in the foregoing petition.

Given under my hand, this the 7th day of August, 1917.

SYDNEY SMITH,
Chief Justice of Supreme Court of Mississippi.

Filed Aug. 7, 1917. Geo. C. Myers, Clerk of Supreme Court.

229 United States of America.

STATE OF MISSISSIPPI,
County of Hinds:

Bond.

Know All Men By These Presents: That we, the Yazoo and Mississippi Valley Railroad Company, E. H. Ratcliff and L. T. Kennedy, principals and the Illinois Central Railroad Company, surety upon this appeal bond, are held and firmly bound unto Mrs. Clara J. Mullins, Administratrix, in the penal sum of Twenty Five Thousand Dollars to be paid to the said obligee, her heirs or successors, and for the payment of which well and truly to be made we bind ourselves and our successors, heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this the — day of August, 1917.

The condition of this obligation is such that, whereas the above named plaintiffs in error, the Yazoo & Mississippi Valley Railroad Company, and E. H. Ratcliff and L. T. Kennedy have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the Supreme Court of Mississippi in the case numbered 19,420 on the dockets and records of the last mentioned court, wherein Mrs. Clara J. Mullins, Administratrix, is plaintiff and the said the Yazoo and Mississippi Valley Railroad Company is defendant and the said E. H. Ratcliff and L. T. Kennedy are sureties on the appeal bond by which the case was carried from
230 the state court of original jurisdiction to the said Supreme Court and the judgment of the said State Supreme Court was a joint judgment against both of the principal obligors herein:

Now, if the above plaintiffs in error, the Yazoo and Mississippi Valley Railroad Company, E. H. Ratcliff and L. T. Kennedy, shall prosecute said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise it shall remain in full force and effect.

YAZOO AND MISSISSIPPI VALLEY R. R. CO.,
By E. H. RATCLIFF AND
L. T. KENNEDY,
MAYES, WELLS, MAY & SANDERS,
Their Attorneys.
ILLINOIS CENTRAL RAILROAD COMPANY,
Surety.
By BURK WELLS, *Attorney in Fact.*

The above bond and surety approved August 7th, 1917.

SYDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

Filed Aug. 7, 1917. Geo. C. Myers, Clerk.

231 YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY

vs.

Mrs. CLARA J. MULLINS, Administratrix.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Mrs. Clara J. Mullins, Administratrix, Natchez, Mississippi, or her attorneys of record, Messrs. Reily & McCall, Meridian, Mississippi, Greeting:

You are hereby cited and admonished to be and appear in Washington, District of Columbia, at the Supreme Court of the United States of America to be held in the City of Washington, in the District of Columbia, within thirty (30) days from the date of this writ, pursuant to the writ of error this day filed in the clerk's office of the Supreme Court of the State of Mississippi, wherein the Yazoo and Mississippi Valley Railroad Company, E. H. Ratcliff and L. T. Kennedy, are plaintiffs and you are defendant in error, to show cause, if any there is, why judgment *on* the writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this the 7th day of August, A. D. 1917, and of the Independence of the United States, the one hundred and forty-first.

SYDNEY SMITH,
Chief Justice of the State of Mississippi.

Waiver of Citation.

We, Messrs. Reily & McCall, attorneys of record and in fact, for Mrs. Clara J. Mullins, administratrix, hereby enter an appearance to the above citation and waive all service and all other formalities, and agree that the waiver of this citation by us shall have the same effect as if regularly served on Mrs. Clara J. Mullins, defendant in error or ourselves.

Witness our signature this the 10th day of August, 1917.

REILY AND McCALL,
Attorneys for Defendant in Error.

STATE OF MISSISSIPPI,
Lauderdale County:

Personally came before the undersigned M. W. Reily of the firm of Reily & McCall, attorneys of record for Mrs. Clara J. Mullins, administratrix, who acknowledged that he signed the above waiver of citation on the day and year above specified.

M. W. REILY.

Witness my official signature this the 11th day of August, 1917.

[Seal Wyatt Easterling, Notary Public, City of Meridian, Miss.]

WYATT EASTERLING,
Notary Public.

Filed Aug. 13, 1917. Geo. C. Myers, Clerk.

232 In the Supreme Court of the United States of America.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

MRS. CLARA J. MULLINS, Administratrix, Defendant in Error.

Writ of Error to the Supreme Court of Mississippi.

Assignment of Errors.

The plaintiffs in error, the Yazoo and Mississippi Valley Railroad Company, E. H. Ratcliff and L. T. Kennedy, show to the court that there are manifest errors prejudicial to them apparent of record in the proceedings, decisions and final judgment of the Supreme Court of the State of Mississippi in the above entitled cause in this to-wit:

The Supreme Court of Mississippi erred in deciding and holding that it was not error on the part of the court of original jurisdiction to refuse to sustain the motion and to exclude the evidence, which motion was made by your petitioner, and to peremptorily give a direction to the jury to find a verdict in favor of the defendant.

2nd. The Supreme Court of Mississippi erred in deciding and holding in its opinion that, conceding that the facts disclosed by the evidence failed to show any negligence on the part of the defendant railroad company and therefore necessarily failing to show that any negligence was the proximate cause of the injuries to the deceased which caused his death and that the defendant's train was properly equipped and that there were no defective ways and appliances and that the train was not negligently handled, yet nevertheless that by reason of the saving help of the Mississippi

prima facie statute, being Section 1985 of the Mississippi
233 Code of 1906, absolute liability was imposed upon the defendant railroad company by reason of said Mississippi prima facie statute and that there should have been by reason of said statute alone, a peremptory instruction directing a verdict for the plaintiff, thereby adding to the Federal Employers' Liability Act and making a part of same, Section 1985 of the Mississippi Code of 1906 and imposing upon the defendant liability for the death of plaintiff's decedent, in the absence of any proof of negligence on the part of the defendant by reason of the application of the Mississippi Statute alone; whereby the said Mississippi Supreme Court failed and refused to hold in accordance with the provisions of the Federal Employers' Liability Act, that all state laws regulating the liability of carriers for injuries to or the death of employees while engaged in interstate commerce were superseded by the Federal Employers' Liability Act.

3rd. The Supreme Court of Mississippi erred in its judgment and opinion by imposing absolute liability on the plaintiff in error, the Yazoo and Mississippi Valley Railroad Company, in the absence of any proof showing or tending to show that plaintiff's decedent came to his death by reason of any negligence on the part of the defendant which was the proximate cause of his injury and death, as is required by the Federal Employers' Liability Act, in order to justify any recovery, and by imposing absolute liability on the said plaintiff in error by reason alone, of the existence and applicability of the Mississippi Statute, Section 1985 of the Mississippi Code of 1906.

4th. The Supreme Court of Mississippi erred in deciding and holding that by application of the said state statute in this case and by the conclusive effect given to it, the said defendant was deprived of its defense as to the assumption of the risk, which applies with its full common law force in actions under the Federal Employers' Liability Act.

234 5th. The Supreme Court of Mississippi erred in that said court applied to this case, which was based on the Federal Employers' Liability Act, the state statute, Section 1985 of the Mississippi Code of 1906, and placed upon that state statute a construction which makes said statute a statute of liability and not merely a rule of evidence, and renders said state statute unconstitutional as taking the property of this plaintiff in error without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

6th. The Supreme Court of Mississippi erred in that it failed and refused to reverse the said cause on the ground of error in the charge of the court of original jurisdiction as to the effect to be given upon the proof of contributory negligence, the court below having instructed the jury that in the event both deceased and the defendant were guilty of negligence, "the jury should diminish the amount of damages shown by the evidence to have been sustained, if any, in proportion to the amount of negligence attributable to the defendant, if any"; whereas the Federal Act provides

"the damages shall be diminished by the jury in proportion to the amount of negligence attributable to said employee."

7th. The Supreme Court of Mississippi erred in failing and refusing to consider any of the assignments of error upon the disposition of said appeal from the judgment of the court of original jurisdiction, solely for the reason that the evidence in the case showed that the plaintiff's intestate was injured by a moving train and that the defendant's liability followed as a matter of law under the provisions of Section 1985 of the Mississippi Code of 1906, when the suit was based upon the provisions of the Employers' Liability Act, and all state laws regulating the liability of carriers for injuries to or the death of employees while engaged in interstate commerce, were superseded and suspended by the Fed-
235 eral Employers' Liability Act.

8th. The Supreme Court of Mississippi erred in holding and adjudicating the applicability of the Mississippi state stat-e, Section 1985 of the Mississippi Code of 1906, and in putting a construction upon said statute imposing absolute liability in the absence of any proof of negligence on the part of the defendant, and in construing said Mississippi *State* as a statute of liability, which makes said statute violative of the provisions of the Fourteenth Amendment to the Constitution of the United States.

9th. In all of the particulars above stated, the Supreme Court of Mississippi denied to plaintiff in error its rights under said acts of Congress, and under the constitution and laws of the United States.

Plaintiffs in error therefore pray the reversal of the final judgment of the Supreme Court of Mississippi, and should the court fail to find a dismissal of the suit warranted by the record, then plaintiffs in error pray for a reversal of the judgment of the Supreme Court of Mississippi and the award of a new trial so that justice may be done, and as in duty bound plaintiffs in error will ever pray etc.

CHAS. N. BURCH,
Attorney for Plaintiff in Error.

MAYES, WELLS, MAY & SANDERS,
Of Counsel.

Copy filed Aug. 7, 1917. Geo. C. Myers, Clerk.

236 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the Supreme Court of Mississippi, Greeting:

Because in the record and proceedings and also in the rendition of judgments of a plea which is in the said Supreme Court of Mississippi before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in said state between Mrs. Clara J. Mullins, Administratrix, plaintiff in

the court of original jurisdiction and the Yazoo and Mississippi Valley Railroad Company, the defendant in said court and E. H. Ratcliff and L. T. Kennedy sureties on the appeal bond given by the said parties to appeal said cause from the court of original jurisdiction to the Supreme Court of Mississippi, decided by the Supreme Court of Mississippi against the said railroad company and the said sureties on its bond, wherein was drawn in question in said suit, the proper construction of the Act of Congress commonly known as the Employers' Liability Act, approved April 22, 1908, being Chapter 149 of thirty-five statutes at large, as amended April 5, 1910, of Chapter 143 of thirty-six statutes at large, and for failing and declining to hold that it was error prejudicial to the railroad company for the trial court to give in charge to the jury as was done, instructions on the trial of the case instructing the jury that under the evidence offered a directed verdict should not be given the defendant as shown by the assignments of error and other errors as set forth in the assignments of error filed herein, manifest error happened to the great damage of the Yazoo and Mississippi Valley Railroad Company, E. H. Ratcliff, and L. T. Kennedy, sureties on the appeal bond as by their complaint appears.

237 We being willing for the error, if any hath been, to be duly corrected and full and speedy justice done to the parties in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 7th day of August, in the year of our Lord 1917.

[Seal U. S. District Court, Southern District of Mississippi.]

R. O. EDWARDS,
Clerk of the United — District Court for the Southern District of Mississippi.

Allowed to operate as a supersedeas by

SYDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

Copy filed Aug. 7th, 1917. Geo. C. Myers, Clerk.

238 *Clerk's Certificate.*

STATE OF MISSISSIPPI,
Hinds County:

I, Geo. C. Myers, Clerk of the Supreme Court of the State of Mississippi, being the Court of said State which has highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are full, true and correct copies of the papers, each and all of them, constituting the record in the said Supreme Court of the State of Mississippi, in the case of

No. 19420.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMP-NY

vs.

Mrs. CLARA J. MULLINS, Administratrix,

all of which are now on file in my office, and which, taken together constitute the record in said Supreme Court of the State of Mississippi.

Given under my hand and seal of said Supreme Court of Mississippi, at Jackson, in the State of Mississippi, this 27th day of August A. D. 1917, and the one hundred and forty first year of the Independence of the United States of America.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

Endorsed on cover: File No. 26,150. Mississippi Supreme Court. Term No. 683. Yazoo & Mississippi Valley Railroad Company and E. H. Ratcliff and L. T. Kennedy, its sureties, plaintiffs in error, vs. Mrs. Clara J. Mullins, administratrix of the estate of James Davis Mullins, deceased. Filed September 15th, 1917. File No. 26,150.

SEP 29 1
JAMES D. M

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Et Al., Petitioners,

vs.

CLARA J. MULLINS, Administratrix of the Estate of J. D. Mullins, Respondent.

No. [redacted]2

PETITION FOR CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Et Al., Petitioners,

vs.

No. 683.

CLARA J. MULLINS, Administratrix of the Estate of J. D. Mullins, Respondent.

PETITION FOR CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

Your petitioners, The Yazoo & Mississippi Valley Railroad Company, and E. H. Ratcliff and L. T. Kennedy, respectfully show that this cause is already pending in this court on a writ of error allowed by the Chief Justice of the Supreme Court of Mississippi, and this petition for certiorari is filed by reason of the doubt on the part of petitioners as to whether the writ of error heretofore allowed brings the case or the whole case before this Court for review of the questions, or of all the questions, upon which a review is sought.

STATEMENT OF THE CASE.

This is an action under the Federal Employers' Liability Act to recover damages on account of the death of J. D. Mullins. Clara J. Mullins, Administratrix of the estate of J. D. Mullins, brought suit in the Circuit Court of Adams County, Mississippi, alleging that on October 14, 1915, J. D. Mullins was a flagman on an interstate train running from a point in Louisiana to a point in Mississippi and that it was the duty of the Railroad Company to furnish Mullins with a safe place to work while mounting and alighting from said train and in the discharge of his duties, and that it was also the duty of the Railroad Company to have its cars and caboose equipped with safe hand-holds, foot-holds, ladders, etc., so that the said Mullins might with safety catch onto and mount said train, and that it was also the duty of said Railroad Company to exercise due care in starting and stopping its trains and in running same, and to refrain from running same at a rapid rate of speed so that the said Mullins might with safety mount said train when his duty so required, and that it was also the duty of said Railroad Company to furnish Mullins with competent medical and surgical attention in the event of injury. The declaration further alleges that it was the duty of Mullins, when said train was ready to start from the town of Harriston to signal the other employees of the train to start same and then to mount the train by climbing upon the handholds, steps or other appliances, but that when said Mullins attempted to mount said train on leaving

Harriston, Miss., he was injured by reason of the failure of the Railroad Company to comply with the duties above set out, whereby Mullins was caused to fall under said train and his right arm crushed and broken, and that the Railroad Company thereafter failed to furnish him with proper medical attention and that Mullins, after lingering about ten hours and suffering greatly, died. (R. 5-8.)

There was a trial of the case in the Circuit Court of Adams County and a verdict and judgment against the Railroad Company for $20,000.00 (R. 119). A motion for a new trial was overruled (R. 120), and an appeal taken to the Supreme Court of Mississippi.

The Supreme Court of Mississippi held in substance that the contention of the appellant, that there was no negligence shown on the part of the Railroad Company as the proximate cause of the injury, was probably well taken, but that, as there was no eye-witness to the injury, the Administratrix was entitled to recover by reason of Section 1985 of the Mississippi Code, and the Supreme Court of Mississippi further held that the verdict was excessive to the extent of $7,500.00, and that if the plaintiff entered a remittitur of $7,500.00, a judgment of $12,500 would be affirmed; otherwise the case would be reversed. The plaintiff entered a remittitur of $7,500.00 and a judgment of $12,500.00 was entered against the Railroad Company and E. H. Ratcliff and L. T. Kennedy, sureties on the appeal bond of the Railroad Company. This judgment of the Supreme Court was entered on July 2, 1917

(R. 124). The defendant Railroad Company thereupon filed a suggestion of error and same was overruled and denied on August 4, 1917 (R. 142). Thereupon your petitioners sued out a writ of error from the Supreme Court of the United States, the same being allowed by the Chief Justice of the Supreme Court of Mississippi and said writ of error was allowed to operate as a supersedeas. (R. 150.)

STATEMENT OF FACTS.

The evidence showed without contradiction that Mullins when last seen before the injury, was standing beside his train at Harriston, Miss., and about five or six cars back from the engine, and that said train was coupled up and ready to leave, north-bound, and that it was the duty of Mullins to give the leaving signal to the engineer and then get upon said train, and that he did give said leaving signal and that the train then started, (R. 63), and a short time thereafter Mullins was found lying on the track with his arm crushed, at a point about 450 feet north of where he was standing when he gave the leaving signal, and that he stated to the parties who found him in his injured condition, "I missed my hold." (R. 14). This is the only explanation he gave of his injury. There was no eye-witness to the injury, but the defendant did show conclusively that it had furnished Mullins with a safe place to work, that its track and roadway were in a safe and proper condition, and that the cars of its train were equipped with safe hand-holds, footholds, ladders, etc., and that its train was carefully and prudently started and operated and not run at an excessive rate of speed, and that the train was started upon a signal given by Mullins while he was standing beside the train, and that he could have mounted said train with safety and that upon giving said signal it was the duty of Mullins to mount said train and it was left to Mullins whether to mount said train on the car where he was then standing

or to use his own judgment in waiting for the caboose to pass him and mount the caboose or passenger car at the end of the train when it reached him, and that the train moved off at a reasonable rate of speed, and that other employes safely mounted the train after it started, and that the Railroad Company was not guilty of any negligence in the operation of its train or as to any defect in its equipment or roadway. (R. 61-72.)

NO PROOF OF CAUSAL NEGLIGENCE—LIABILITY BASED ON A STATE STATUTE.

It is the contention of the Railroad Company that there was no proof of any negligence which contributed to the injury and that therefore, a directed verdict (or a peremptory instruction as it is called in Mississippi), should have been given in favor of the Railroad. The Supreme Court of Mississippi held that this contention was probably well taken and would justify a reversal of the case, but for the operation of Section 1985 of the Mississippi Code. In its opinion, the Supreme Court of Mississippi said:

> "The main contention urged for reversal is that the peremptory instruction asked by the railroad should have been granted because the appellee failed to show any negligence on the part of the railroad, and that at all events, appellee did not prove that the negligence of appellant proximately caused the injury of the deceased. This contention may be correct and **would justify a reversal of the judgment** if

the appellee had no other ground upon which to rest the judgment. But it is unnecessary for us to pass upon this question as our prima facie statute, section 1985 of the Code of 1906, is applicable to this case and comes to the aid of appellee as "a present help." The whole evidence in the case shows conclusively that the injury was inflicted by the running of the cars of appellant, and the burden was upon the railroad to explain the injury and show how it occurred. This was not done, and it appears that **it could not be explained** at the trial as no person knew how it occurred. The brief of counsel for the appellant contains this statement of fact:

'No person seemed to know just how the accident occurred. At all events, no witness could be produced, or was produced, who saw the actual infliction of the injury, but the testimony did show that the injured flagman stated that he had received his injury by reason of the fact that he had 'missed his hold.' As to when he 'missed his hold' or as to what part of the train he was occupying at the time, or as to whether or not it was before or after he boarded the train, or as to what caused him to 'miss his hold' and as to what he had hold of, the record is entirely silent and no witness could be produced who could testify.'

"Therefore the plaintiff having proved a case within the prima facie statute, and the defendant railroad **having failed to explain the injury, its negligence and liability conclusively appeared as a matter of law,** and the circuit judge should have peremptorily instructed the jury to find for the plaintiff; and this being true, it follows that appellant cannot com-

plain because the question of negligence vel non was submitted to the jury." (R. 144.)

Y. & M. V. vs. Mullins, 76 Southern Reporter, 147.

Said Section 1985 of the Mississippi Code provides as follows:

> "1985. (1808) Injury to persons or property by railroads prima facie evidence of want of skill, etc. In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be **prima facie evidence** of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employes of railroad companies."

Our construction of the foregoing excerpt from the opinion of the Mississippi Supreme Court is, that the court indicated very clearly that it was its opinion that the contention of the Railroad Company that it was not guilty of any causal negligence was sound and would justify a reversal of the case but for the operation of section 1985 of the Mississippi Code. However, as the Court in the foregoing excerpt states "it is unnecessary for us to pass upon this question," it may be contended that the Mississippi Supreme Court has neither passed upon the question of causal negligence vel non, nor even indicated or suggested any view on that question. If this be the correct construction of the opinion of the Mississippi Supreme Court, then it necessarily follows that the

Mississippi Supreme Court has based its judgment entirely and exclusively on a state statute, although the case is one governed by the Federal Employer's Liability Act.

The **trial judge** had instructed the jury that Section 1985 of the Mississippi Code had no application to the case as the case fell under the Federal Employers' Liability Act and submitted the case to the jury on the question of negligence **vel non**.. (R. 116.) The Supreme Court of Mississippi, however, held that the statute did apply to the case and controlled the case, and the construction which the Supreme Court of Mississippi gave to the statute is the basis of the decision of the Mississippi Supreme Court. The Mississippi Supreme Court held in its opinion, (Y. & M. V. v. Mullins, 76 Southern Reporter, 147), that said statute was merely a rule of evidence and not a rule of substantive law and, being a mere rule of evidence, that said statute could be properly applied to the decision of the case.

The Railroad Company in its suggestion of error (R. 125) insisted, in addition to the other errors relied on, that the construction which the Mississippi Supreme Court had given said statute made it a rule of substantive law and a rule of liability and not a rule of evidence, and that said construction of Section 1985 of the Mississippi Code rendered said statute unconstitutional, in that it deprived defendant of due process of law and the equal protection of the laws in violation of the Fourteenth

Amendment of the Constitution of the United States. Said suggestion of error was overruled and denied by the Mississippi Supreme Court. Petitioners now state that they are advised that, insofar as said Supreme Court of Mississippi held that Section 1985 of the Mississippi Code, as construed by said Court, is a constitutional statute and not in violation of the Fourteenth Amendment of the Constitution of the United States, the writ of error in this case was properly allowed and properly brings before this Court the question of the constitutionality and validity of said statute, but your petitioners, being in doubt whether other questions arising under the Federal Employers' Liability Act in this case are brought up by said writ of error, now file this petition for certiorari so that not only the constitutional question above suggested, but other questions arising in said case under the Fedral Employers' Liability Act, may be reviewed, in accordance with Section 237 of the Judicial Code as amended by the Act of Congress of September 6, 1916.

SPECIFICATION OF ERRORS.

Your petitioners now aver the following plain errors were committed by the Mississippi Supreme Court in the decision of this case; and the following rights and immunities were denied petitioners under the Federal Employers' Liability Act:

1. The Court erred in holding that Section 1985 of the Mississippi Code as construed by the said court is con-

stitutional and not in violation of the Fourteenth Amendment of the Constitution of the United States, in that it does not deny petitioners due process of law and the equal protection of the laws, and is a proper basis, in and of itself, without evidence of causal negligence, for a judgment in favor of the plaintiff under the Federal Employers' Liability Act. As this matter has already been discussed above, no further reference will be made to it here.

2. Said Mississippi Supreme Court erred in holding that said Section 1985 of the Code of Mississippi had application to this case, which falls under the Federal Employers' Liability Act, but petitioners aver that the Federal Employers' Liability Act is complete in and of itself and it permits recovery only to the extent and on the grounds therein stated, and that said Act cannot be pieced out or added to by this State statute.

3. Said Mississippi Supreme Court erred in not reversing the judgment in this cause because of the error in the trial court in charging the jury "that it was the absolute duty of the defendant to furnish the deceased with a safe place to perform the duties incident to his employment, and with safe cars and appliances," (R. 113), whereas the only duty required of the defendant is to exercise ordinary care to provide a **reasonably safe** place to work and to furnish **reasonably safe appliances.** (There was no proof that the Safety Appliance Acts of Congress had been violated, the contention of the plaintiff in this

regard being that the end car of the freight train was a passenger car instead of a caboose and that a caboose is somewhat easier to board than a passenger car, (R. 101), but there was no proof that the passenger car or any other car in the train had defective safety appliances and indeed the defendant showed all appliances in good order. (R. 101, 65, 71, 81, 82.)

4. The Mississippi Supreme Court erred in refusing to reverse said judgment on account of the error of the trial court in the instruction of the trial court as to contributory negligence. Said trial court instructed the jury that in the event of contributory negligence "the jury should diminish the amount of damages shown by the evidence to have been sustained, if any, in proportion to the amount of negligence attributable to the **defendant,** if any," (R. 114) whereas under the Federal Employers' Liability Act the reduction of damages is required to be in proportion to the amount of negligence attributable to the **plaintiff** and **not to the defendant.**

5. The Mississippi Supreme Court erred in failing to reverse the judgment in this cause on account of the following erroneous instruction given by the trial judge:

> "The court instructs the jury for the plaintiff: That before you can hold the deceased to have assumed the risk from which the deceased sustained the injuries complained of, it devolves upon the defendant to prove by a preponderance of the evidence that he did so assume the risk which was the cause of the injuries sustained by him." (R. 114.)

6. The Mississippi Supreme Court erred in refusing to reverse this cause on account of the following erroneous instruction given by the trial judge:

> "The court instructs the jury for the plaintiff: That if you believe from the evidence in this case that the defendant railroad company took charge of the deceased after his injury and brought him to Natchez, and later placed him in charge of the Natchez Sanitarium and that in the performance of these acts the defendant company was negligent, in failing to provide prompt and proper attention and that that negligence contributed in whole, or in part to the death of the deceased, and that up to the time of that negligence the defendant company was guilty of no other negligence in this case, then in that event, you should find for the plaintiff, but you should not assess any damages for pain and suffering to the deceased, prior to the time the defendant company was negligent in attention furnished him after the injuries, if any, and providing you further believe that the deceased was not himself guilty of contributory negligence and did not assume the risk." R. 115.)

Your petitioners state that said instruction was erroneous for the reason that no recovery is allowable under the Federal Employers' Liability Act for failure to furnish prompt and proper medical attention and for the further reason that the record showed that prompt and proper medical attention was furnished and that the Railroad Company had employed competent physicians and had put them in attendance upon the deceased and the

Railroad Company is not responsible for the mistakes, if any, made by surgeons employed to attend the deceased.

7. The Mississippi Supreme Court erred in failing to reverse this case on account of the error of the trial judge in admitting evidence to show the extent to which the deceased contributed to the support of his sister. Said evidence was incompetent and prejudicial for the reason that under the Federal Employers' Liability Act the recovery, if any, is solely for the benefit of the mother. (R. 53, 54.)

8. The Mississippi Supreme Court erred in refusing to consider the several assignments of error filed in that court and in imposing liability upon petitioners by reason of said Section 1985 of the Code of Mississippi.

9. The Mississippi Supreme Court erred in refusing to reverse and remand said cause on the ground that a directed verdict should have been given in favor of the Railroad Company.

PRAYER.

Your petitioners refer to the certified copy of the record and all the proceedings in this cause now on file in this Court under the writ of error already sued out from this Court to Supreme Court of Mississippi, and your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Mississippi and the judges thereof,

commanding the said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Mississippi Supreme Court in this cause, entitled "Yazoo & Mississippi Valley Railroad Company vs. Mrs. Clara J. Mullins, Administratrix," and being No. 19420 on the docket of said Mississippi Supreme Court, to the end that this cause may be reviewed and determined by this Court, and your petitioners pray that the record and proceedings already on file in this cause in this Court under the writ of error heretofore granted be taken as a return to said writ of certiorari and your petitioners pray that they may have such other and further remedies and relief in the premises as to this Court may seem appropriate and in conformity with law, and that the judgment of said Mississippi Supreme Court in this cause and every part thereof, be reversed by this Honorable Court and your petitioners will ever pray.

CHARLES N. BURCH,
H. D. MINOR,
Attorneys for Petitioners.

Charles N. Burch, being duly sworn, says that he is one of the counsel for the petitioners in the above case, and that he prepared the foregoing petition and that the allegations therein are true as he verily believes.

CHAS. N. BURCH,

Subscribed and sworn to before me, this 24th day of September, 1917.

E. C. TURNER,
(Seal) Notary Public.

My Commission expires 16th day of January, 1919.

In my opinion the foregoing petition is well founded in law.

CHAS. N. BURCH,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

NO. 683.

The Yazoo & Mississippi Valley Railroad Company, et al.,
Petitioners,
Vs.
Clara J. Mullins, Administratrix of the Estate of J. D. Mullins, Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

May it Please the Court:

As will appear from the foregoing petition for certiorari, this case falls under the Federal Employers' Liability Act and is a suit to recover damages on account of the death of J. D. Mullins, who was a flagman on an interstate freight train of the Y. & M. V. Railroad running from a point in Louisiana to a point in Mississippi. When Mullins' train reached Harriston, Miss., it was necessary to go into a passing track to let a passenger train go by, and also to do some switching necessary for setting out a car at Harriston. It was also necessary that the engines (the train was a double-header) should take coal and water. Mullins assisted in these operations and when the train was coupled up and standing still, Mullins was

standing beside his train, about 5 or 6 car lengths back of the engine (R. 65). It was night, or rather very early in the morning, and dark. It was Mullins' duty to give the starting signal and to then get on the train. Mullins did give the starting signal and this was obeyed by the engineers, who proceeded north with the train towards its final destination, which was Vicksburg, Mississippi (R. 74). The fact that Mullins was not on the train was not discovered by the train crew until they reached Port Gibson, a station north of Harriston. The train left Harriston at 3:40 A. M. and shortly after 4 o'clock A. M. Mullins was discovered lying on the track with his arm crushed. (R. 16.) He was heard groaning by Martha Gibson, who lived nearby. She woke up her husband and they went to the place where Mullins was lying. The only explanation which he gave of his injury was "I missed my hold." (R. 14.) No one saw Mullins after he gave the signal to the engineer to proceed. All the facts and circumstances, however, immediately preceding the injury and during the time of the injury and subsequent to the injury were developed by the proof, and the Railroad Company showed by the members of the train crew and other parties that its track and roadway were in good condition, and that its train was prudently and carefully operated, and that its cars had safe handholds, ladders, etc., and that other members of the train crew boarded the train after Mullins gave the signal for leaving, and that there was no negligence on the part of the Railroad Company in the operation of its train, and no defect in its

roadway or equipment, and, in fact, no negligence contributing to the injury. (R. 101, 65, 71, 81, 82, 88, 89, 90.) There was no witness who could be produced who saw Mullins fall, or saw him when he was injured, but all the facts and circumstances, that could be shown, were shown. It was the contention of the Railroad Company that in order for the Administratrix of Mullins to recover, there must be proof of negligence on the part of the Railroad Company proximately contributing to the injury. This contention of the Railroad Company was apparently found by the Mississippi Supreme Court to be well taken, but the Mississippi Supreme Court held the Railroad Company liable by reason of Section 1985 of the Mississippi Code, notwithstanding that the trial court had expressly excluded the operation of this statute from the case.

I.

IN HOLDING THAT THE PLAINTIFF WAS ENTITLED TO RECOVER BY REASON OF A STATE STATUTE IN A CASE FALLING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT AND IN CONSTRUING SAID STATUTE SO AS TO MAKE IT A RULE OF SUBSTANTIVE LAW, AND, INDEED, OF LIABILITY, AND NOT A MERE RULE OF EVIDENCE, THE DEFENDANT RAILROAD COMPANY WAS BY THE APPLICATION OF SAID STATUTE, SO CONSTRUED, DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW AND

DENIED THE EQUAL PROTECTION OF THE LAWS, AND SAID STATUTE SO CONSTRUED IS UNCONSTITUTIONAL AND VOID.

Section 1985 of the Mississippi Code provides as follows:

> "1985. (1808) Injury to persons or property by railroads prima facie evidence of want of skill, etc. In all actions against railroad companies for damages due to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employes of railroad companies."

Assuming for the moment that said statute can be availed of at all and is applicable in a case falling under the Federal Employers' Liability Act, we insist that said statute as construed by the Mississippi Supreme Court is unconstitutional. The constitutionality of this statute has heretofore been passed upon by this Court in the case of Mobile, etc., R. R. Co. vs. Turnipseed, 219 U. S. 35. In that case this court held the statute constitutional **as then construed** by the Mississippi Supreme Court. The construction, however, which the Mississippi Supreme Court has given said statute in the instant case, we insist, is the very construction which this Court in the Turnipseed case indicated would render such statute unconstitutional. In the Turnipseed case, this Court said:

"We are not impressed with the argument that the Supreme Court of Mississippi, in construing the act, has declared that the effect of the statute is to create a presumption of **liability**, giving to it, thereby, an effect in excess of **a mere temporary inference of fact.** The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing **some evidence** to the contrary. When that is done **the inference is at an end**, and the question of negligence is one for the jury, upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law.

The statute does not, therefore, deny the equal protection of the law, or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the **absence of other evidence contradicting such inference.**

That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a **purely arbitrary mandate.** So, also, it must not, **under guise of regulating the presentation of evidence** operate to preclude the

party from the right to present his defense to the main fact thus presumed.

If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

(Mobile, etc., R. Co. vs. Turnipseed, 219 U. S. 35.)

We submit, therefore, that the construction which this Court gave said statute in the Turnipseed case is not the construction which the Mississippi Supreme Court has given said statute in the instant case.

In the Turnipseed case this Court held that said statute created "a mere **temporary** inference of fact," and that the only effect of the statute was to cast upon the railroad company the duty "of producing some evidence to the contrary." In the instant case, notwithstanding ample "evidence to the contrary" and notwithstanding the Mississippi Supreme Court held that the contention of freedom from negligence on the part of the Railroad Company was probably well founded, and "would justify a reversal of the judgment if the appellee had no other ground upon which to rest the judgment," yet the Mississippi Supreme Court then proceeds in its opinion to rest the judgment upon Section 1985 of the Code for the reason that the Railroad Company was unable to produce **any witness who saw the accident**. The

Railroad Company did show all the facts and circumstances and did do just what is suggested in the Turnipseed case, that is, it did produce evidence rebutting any inference of negligence, in that the railroad company showed that its track and roadway and equipment were in safe condition, that its train was prudently and carefully operated, and that generally there was no negligence on its part. The effect of this decision of the Mississippi Supreme Court is to hold that whenever a party is killed by a moving train and no eye-witness to the injury can be produced, liability follows as matter of law, even though the Railroad Company shows that its track and roadway and equipment were safe and that its trains were prudently operated and that it was free from negligence. This holding in this case of the Mississippi Supreme Court was not, therefore, giving effect to a mere temporary inference of negligence, and requiring the Railroad Company to produce some evidence to rebut that fact, but the holding of the Mississippi Supreme Court was an arbitrary mandate taking the property of the defendant railroad company "under guise of regulating the presentation of evidence." In order that the Court may see the basis of the decision of the Mississippi Supreme Court, we re-quote what the Mississippi Supreme Court said on this point:

> "The appellant assigns and urges several errors of the lower court. The main contention urged for reversal is that the peremptory instruction asked by the railroad should have been granted because the

appellee failed to show any negligence on the part of the railroad, and that at all events appellee did not prove that the negligence of appellant proximately caused the injury of the deceased. This contention may be correct and would justify a reversal of the judgment if the appellee had no other ground upon which to rest the judgment. But it is unnecessary for us to pass upon this question, as our prima facie statute (section 1985 of the Code of 1906) is applicable to this case and comes to the aid of appellee as a 'present help.' The whole evidence in the case shows conclusively that the injury was inflicted by the running of the cars of appellant, and the burden was upon the railroad to explain the injury and show how it occurred. This was not done, and it appears that it could not be explained at the trial as no person knew how it occurred. The brief of counsel for the appellant contains this statement of fact:

'No person seemed to know just how the accident occurred. At all events no witness could be produced or was produced who saw the actual infliction of the injury, but the testimony did show that the injured flagman stated that he had received his injury by reason of the fact that he had 'missed his hold.' As to when he 'missed his hold,' or as to what part of the train he was occupying at the time, or as to whether or not it was before or after he boarded the train, or as to what caused him to 'miss his hold,' and as to what he had hold of, the record is entirely silent, and no witness could be produced who could testify.' ''

We submit that when a defendant has produced all the

proof in regard to an injury that can be produced and has shown an entire freedom of negligence on his part, any statute which then makes a statutory presumption of negligence prevail as a basis of a judgment in favor of the plaintiff is necessarily an arbitrary mandate and a taking of property without due process of law.

It may be added that the construction which the Mississippi Supreme Court has given Section 1985 of the Mississippi Code in this case is entirely at variance with the construction which that Court has heretofore given that statute.

Railroad vs. Daniel, 108 Miss. 358.
Railroad vs. Thornhill, 106 Miss. 387.

SECTION 1985 OF THE MISSISSIPPI CODE MAKING THE PROOF OF INJURY INFLICTED BY THE RUNNING OF A TRAIN PRIMA FACIE EVIDENCE OF NEGLIGENCE ON THE PART OF THE RAILROAD COMPANY, AS CONSTRUED BY THE MISSISSIPPI SUPREME COURT IN THIS CASE, HAS NO APPLICATION AND CANNOT BE AVAILED OF IN A CASE FALLING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

The statute of Mississippi as construed by the Mississippi Supreme Court in this case is not merely a rule of evidence, but a rule of substantive law and as the Federal Employers' Liability Act is complete in and of itself, and supersedes and is exclusive of any State statute, this Mis-

sissippi statute cannot be availed of by merely denominating it a rule of evidence when it is so applied as to be a rule of substantive law. The very question here considered was decided by this Court in the case of Central of Vermont Railway Co. vs. White, 238 U. S. 507. That was a case under the Federal Employers' Liability Act. Under the Vermont Law, it appeared that it was incumbent upon the plaintiff not merely to show negligence of the defendant, but also that the plaintiff was free from contributory negligence, and the Vermont Court held that the duty of the plaintiff to show freedom from contributory negligence under the Vermont law had no application in a case under the Federal Employers' Liability Act, and this ruling was sustained by the Supreme Court of the United States. In that case this Court said:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought (M'Neil v. Holbrook, 12 Pet. 89, 9 L. ed. 1011). **But matters of substance and procedure must not be confounded because they happen to have the same name.**"

And likewise in the same case, the Supreme Court said:

> "As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the state court can in those similar instances follow their own prac-

tice even in the trial of suits arising under the Federal law.

But it is a **misnomer** to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those states the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States Courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal Courts have enforced that principle even in the trials in states which hold that the burden is on the plaintiff. Washington & C. R. Co. v. Gladmon, 15 Wall. 401 (1), 407, 408, 21 L. ed. 114-116; Hough v. Texas & P. R. Co. 100 U. S. 225, 25 L. ed. 617; Inland & Seaboard Coasting Co. v. Tolson, 138 U. S. 551 (4), 557, 35 L. ed. 270, 272, 11 Sup. Ct. Rep. 653; Washington & C. R. Co. v. Harmon (Washington & C. R. Co. v. Tobriner, 147 U. S. 581, 37 L. ed. 288, 13 Sup. Ct. Rep. 557; Hemmingway v. Illinois Central R. Co. 52 C. C. A. 477, 114 Fed. 843; Congress in passing the Federal Employers' Liability Act, evi-

dently intended that the Federal Statute should be construed in the **light of these and other decisions of the Federal courts.** Such construction of the statute was, in effect, approved in Seaboard Air Line R. Co. v. Moore, 228 U. S. 434, 57 L. ed. 907, 33 Sup. Ct. Rep. 580. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof."

(Central Vermont R. Co. v. White, 238 U. S. 507.)

The basis of liability under the Federal Employers' Liability Act is negligence and unless negligence be proven there can be no recovery, and the plaintiff cannot recover by reason of a 'present help,' to use the words of the Mississippi Supreme Court, coming to his aid in the form of a state statute. The defendant in this case had a substantive right, upon the failure of any proof of negligence on its part, to a directed verdict in its favor. This substantive right cannot be lessened or taken away by any State statute, or by any state rule of practice or procedure. As was said by this Court in Norfolk Southern R. Co. vs. Ferrebee, 238 U. S. 269, "but a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice." This Court has frequently held that the Federal Employers' Liability Act supersedes all State laws on the same subject. In the recent case of New York Central R. Co. vs. Winfield, 37 Sup. Ct. Reporter, 546, this Court held that Congress had acted upon the liability of interstate railroad companies to their employes while engaged in inter-

state commerce and "that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the National authority." In the same case this Court held that the Federal Employers' Liability Act was uniform throughout the States.

In other words, if there can be a recovery under this Act in one state, then there can be a recovery in every other state, and that the effect and application of the Act does not change at State lines, and the Court said in the course of the opinion just referred to "and there are weighty considerations why the controlling law should be uniform and not change at every state line." And in the same case this Court said:

> "And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employes in interstate commerce from the operation **of varying state laws**, and to apply to them a national law having a uniform operation throughout all the states. House Report No. 1386 and Senate Report No. 460, 60th Cong. 1st Sess. Thus, in the House Report it is said: 'It (the bill) is intended in its scope to cover all commerce to which regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability of common carriers to their employes . . . A federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce.

It will create uniformity throughout the Union, and the legal status of such employers' liability for personal injuries, instead of being subject to numerous rules, will be fixed by **one rule in all the states.**"

(New York Central R. Co. v. Winfield, 37 Sup. Ct. Rep. 546.)

And again in the same case, this Court, after holding that in cases under the Federal Employers' Liability Act that there was one rule in all states, further held that recovery could only be had where the injury results from negligence, and therefore necessarily excluded the application of a New York State law which provided for compensation in the absence of negligence. And the Court further said in the same case:

"That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, and other cases, it is pointed out that the subject which the act covers is 'the responsibility of interstate carriers by railroad to their employees injured in such commerce;' in Michigan C. R. Co. v. Vreeland 227 U. S. 59, 66, 67, 57 L. ed. 417, 419, 420, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, it is said that 'we may **not piece out this act of Congress** by resorting to the local statutes of the state of procedure or that of the injury;' that by it 'Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce,' and that it is 'paramount and exclusive;' in North Caro-

lina R. Co. v. Zachary, 232 U. S. 248, 256, 58 L. ed. 591, 594, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce, the Federal act governs to the exclusion of the state law; in Seaboard Air Line R. Co. Horton, supra, pp. 501, 503, it is said not only that Congress intended 'to exclude responsibility of the carrier to its employees' in the absence of negligence, but that it is not conceivable that Congress 'intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer;' and in Wabash R. Co. v. Haynes, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224, it is said: 'Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the state; in other words, the Federal act would have been exclusive in its operation, not merely cumulative (citing cases). On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the state was controlling.''

(New York Central R. Co. v. Winfield, 37 Sup. Ct. Rep., 548.)

To the same effect is the decision of this Court in Erie Railroad Co. vs. Winfield. In that case this Court said:

> "It establishes a rule or regulation which is intended to operate uniformly in all the states, as respects interstate commerce, and in that field it is both paramount and exclusive."
>
> (Erie R. Co. v. Winfield, 37 Sup. Ct. Rep. 556.)

In the case just referred to there was a question as to whether the carrier was bound by a state statute in view of the provisions of the state statute that the carrier should be presumed to have contracted with reference to said state statute and in the event that the carrier did not give notice that it did not intend to be bound by the State Compensation Statute, the State law provided that the carrier "shall be presumed to have been bound thereby." In speaking of the State Compensation Statute, and holding its provisions inapplicable in a case under the Federal Employers' Liability Act, this Court said:

> "But such a presumption cannot be indulged here, and this for the reason that by the Federal act **the entire subject,** as respects carriers by railroad and their employees in interstate commerce **was taken without the reach of the state laws.** It is beyond the power of any state to interfere with the operation of that act, either by putting the carrier and their employees to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption."
>
> (Erie Railroad Co. vs. Winfield, 37 Sup. Ct. Rep. 557.)

Under the ruling of the Supreme Court of Mississippi in this case the plaintiff would obtain a recovery in Mississippi in a case falling under the Federal Employers' Liability Act, whereas the plaintiff could not recover in a state which did not have a statute making an injury by a moving train prima facie evidence of negligence

There are other states which have statutes somewhat similar to Section 1985 of the Mississippi Code, but in several well-considered cases these statutes have been held to have no application to cases falling under the Federal Employers' Liability Act. In the case of L. & N. R. Co. vs. Rhoda, 74 Southern (Fla.) 19, it was held that the presumption of negligence statute of that state in cases of injury inflicted by a train, had no application to a case falling under the Federal Employers' Liability Act. The question is elaborately and carefully considered by the Florida Supreme Court. That case had been before the Florida Supreme Court on a previous occasion and on the first appeal it was held that the presumption of negligence statute did apply to a case falling under the Federal Employers' Liability Act. After the first appeal, the case was brought to this Court and was reversed in a **per curiam** opinion, reported in 238 U. S. 608. This court in its **per curiam** opinion does not discuss the case, but merely cites other cases upon the authority of which the reversal was had.

We particularly call the attention of this Court to the opinion of the Florida Supreme Court in L. & N. R. R. vs. Rhoda, 74 Southern Reporter, 19. It contains a most

careful discussion of the question here involved. So, likewise, in the case of South Covington R. Co. vs. Finan's Administrator, (Ky.), 155 Southwestern Reporter, 742, it was held that a state prima facie negligence statute had no application to a case falling under the Federal Employers' Liability Act. To the same effect, see also L. & N. R. Co. vs. Kemp, 79 Southeastern, (Ga.), 558, and Kansas City, S. R. Co. vs. Cook, 140 Southwestern Reporter, (Ark.) 579.

In making the above argument and in insisting that the Supreme Court of Mississippi has held that the Railroad Company in this case was free from negligence, we are not unmindful of the fact that the opinion of the Supreme Court of Mississippi is open to the contention that it was not distinctly held that the Railroad Company was free from negligence. We think the Supreme Court of Mississippi did mean to hold by its opinion that the Railroad Company was free from negligence for the Supreme Court of Mississippi says that the contention that the Railroad Company was free from negligence "may be correct and **would justify a reversal.**"

However, in the following sentence the Mississippi Supreme Court says "but it is unnecessary for us to pass upon this question as our prima facie statute (section 1985 of the Code of 1906) is applicable to this case and comes to the aid of appellees as a present help." If it be true, therefore, that the Mississippi Supreme Court did not decide and did not pass upon the question as to

whether there was any negligence proven on the part of the Railroad Company, then certainly the judgment in this case is based entirely and exclusively upon the Mississippi Prima Facie statute. In other words, in a case falling under the Federal Employers' Liability Act the judgment is not based upon that Federal Statute which alone is applicable, but is based exclusively upon a State statute. Certainly a judgment in a case falling under the Federal Employers' Liability Act, if it is to stand, must have its foundation in that act and not in a state statute, for as already shown all State statutes are superseded and set aside by the Federal Act. Our complaint is that in this case the Mississippi Supreme Court has not construed Section 1985 of the Mississippi Code as creating a mere temporary inference of negligence, but it has construed said statute as creating a permanent inference of negligence, notwithstanding the fact that the Railroad Company produced ample proof to show that it was free from negligence.

III.

THE DUTY OF THE RAILROAD COMPANY WAS TO EXERCISE REASONABLE CARE TO FURNISH PLAINTIFF NOT AN ABSOLUTELY SAFE PLACE TO WORK, OR ABSOLUTELY SAFE APPLIANCES, BUT MERELY TO EXERCISE REASONABLE CARE TO FURNISH A REASONABLY SAFE PLACE TO WORK AND REASONABLY SAFE APPLIANCES.

The trial judge gave the following instruction in favor of the plaintiff:

"The Court instructs the jury for the plaintiff: That it was **the absolute duty** of the defendant to furnish the deceased with **a safe place** to perform the duties incident to his employment and with **safe cars and appliances** and to operate its cars in a reasonably prudent and careful manner so as to avoid injury to the deceased and its other employees, and that if the jury believe from the evidence that the defendant was negligent in regard to any of these duties, and that such negligence contributed in whole or in part to the death of the deceased, that in that event the jury are told by the Court that they should find for the Plaintiff." (R. 113.)

The effect of the above instruction was to make the defendant a guarantor of the safety of its employes. This is not a correct rule of law. In the case of Chicago & Northwestern R. Co. vs. Bower, 241 U. S. 470, this Court said:

"The rule of law is: That the employer is under a duty to exercise **ordinary care** to supply machinery and appliances **reasonably safe** and suitable for the use of the employee, but it is not required to furnish the latest, best, and safest appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable. Washington & G. R. Co. v. McDade, 135 U. S. 544, 570, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Patton v. Texas & P. R. Co., 179 U. S. 658, 664, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275."

(Chicago & N. W. R. Co. vs. Bower, 241 U. S. 470.)

And in the case of Seaboard Air Line Railroad Co. vs. Horton, 233 U. S. 492, there was under consideration the question of the duty of the defendant as to furnishing the plaintiff a safe place to work.

The following excerpt from this Court's opinion shows the instruction under consideration.

> "Upon the issue of defendant's negligence, the trial court charged the jury as follows:
>
> 'It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work.' And in various other forms the notion was expressed that the duty of defendant **was absolute** with respect to the safety of the place to work and of the appliances for the work. Thus: 'If you find from the evidence that it (the locomotive engine) was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue, "Yes." ' "
>
> (S. A. L. vs. Horton, 233 U. S. 500.)

In commenting on the above instructions the Court held that the State Court had erroneously applied the local rule of responsibility instead of the rule of the Fed-

eral Courts, and that the Federal Employers' Liability Act contained two branches, one covering the negligence of officers, agents, and employes, and in effect abolishing the fellow-servants rule, and the other branch relating to defects and insufficiencies in cars, engines, appliances, etc., and this Court then said:

> "But plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to **base the action upon negligence only**, and **to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence.** The **common-law rule** is that an employer **is not a guarantor of the safety** of the **place of work** or of the **machinery** and **appliances** of the work; the extent of its duty to its employees is **to see that ordinary care and prudence** are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen."
>
> (S. A. L. R. Co. vs. Horton, 233 U. S. 501.)

And finally in commenting upon the error of the instruction quoted above, this Court said:

> "The instructions above quoted imposed upon the employer an **absolute responsibility** for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error."
>
> (S. A. L. vs. Horton, 233 U. S. 501.)

And in the case of Choctaw, O. & G. R. Co. v. Tennessee, 191 U. S. 326, this Court on the same subject said:

> "The chief ground upon which the demand for a new trial is founded outside of the above rests upon certain portions of the charge of the court to the jury in speaking of the law relating to the responsibility of an employer to his servant to furnish proper machinery and appliances for his employee. In two or three places, in the course of his charge to the jury upon that subject, the court, in speaking of the testimony in regard to the facts occurring at the time of the accident, said that the company owed to its employees the duty of furnishing machinery in a reasonably safe condition and a reasonably safe place for the servant to work in the discharge of his duties, and a failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties, if the servant's own acts of negligence do not contribute to the accident.
>
> "The fault found with this observation is that the court should have added that the company did not absolutely guarantee to furnish its employees a reasonably safe place to work and reasonably safe machinery with which to discharge their duties, but that it fulfilled its obligations if it observed reasonable care to furnish its employees those reasonably safe places to work, etc.
>
> "It need not be questioned that the charge of the court, without the limitation proposed, was an erroneous exposition of the law. Hough v. Texas & P. R. Co., 100 U. S. 213, 25 L. ed. 612; Union P. R. Co. v.

O'Brien, 161 U. S. 451, 457, 40 L. ed. 766, 770, 16 Sup. Ct. Rep. 618 and cases cited."

The above authorities are only a few of many which could be cited, but they are recent decisions of this Court and, we think, clearly demonstrate the error of the instruction given to the jury in this case relative to the duty of the master as to furnishing a safe place to work.

IV.

THE COURT ERRED IN INSTRUCTING THE JURY THAT IN THE EVENT OF CONTRIBUTORY NEGLIGENCE THE AMOUNT OF DAMAGES SHOULD BE DIMINISHED IN PROPORTION TO THE NEGLIGENCE ATTRIBUTABLE TO **THE DEFENDANT.**

In this connection, the trial judge gave the following instruction to the jury:

"The Court instructs the jury for the plaintiff:—That even though the jury may believe that the deceased was guilty of contributory negligence, that this fact would not bar the Plaintiff from recovering in this case; providing the jury further believe that negligence of the Defendant was wholly or partially responsible for the injuries sustained by the deceased, if any, but that in the event that the jury should believe that both the deceased and the Defendant were guilty of negligence which contributed to the injuries sustained by the deceased, that in that event the jury should diminish the amount of damages shown by the evidence to have been sustained,

if any, in proportion to the amount of negligence attributable to the defendant, if any." (R. 114.)

The above instruction is in the teeth of Section 3 of the Federal Employers' Liability Act. By that Section of said Act, in the event of contributory negligence, it is provided: "The damages shall be diminished by the jury in proportion to the amount of negligence attributable to **such employee.**" The Court makes in its charge the diminution in proportion to the negligence attributable to **the defendant.** In other words, under the instruction of the Court the diminution of damages would be least in that case wherein the plaintiff was most negligent and the defendant was least negligent. In the case of Seaboard Air Line R. Co. vs. Tilghman, 237 U. S. 499, this Court said in speaking of the meaning of the Section of the Federal Employers' Liability Act covering contributory negligence:

> "It means, and can only mean, as this court has held, that, where the causal negligence is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportionate part of the damages corresponding to the **employee's contribution** to the total negligence. Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 122, 57 L. ed. 1096, 1101, 33 Sup. Ct. Rep. 654, Ann cas.

1914C, 172; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 49, 58 L. ed. 838, 842, 34 Sup. Ct. Rep. 581, Ann Cas. 1914C, 168.

At the trial the Court instructed the jury that, if they found the plaintiff was injured through the concurring negligence of the railway company and himself, they should determine the full amount of damages sustained by him, 'and then deduct from that whatever amount you think would be proper for his contributory negligence.' This was reiterated in different ways and somewhat elaborated, but the fair meaning of all that was said was that a reasonable allowance or deduction should be made for the plaintiff's negligence, and that it rested with the jury to determine what was reasonable. No reference was made to the rule of proportion specified in the statute, or to the occasion for contrasting the negligence of the employee with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable. In this there was a failure to give proper effect to the part of the statute before quoted. It prescribes a rule for determining the amount of the deduction required to be made, and the jury should have been advised of that rule and its controlling force.

It results that the objection to the instruction upon this subject was well taken and should have been sustained."

(Seaboard Air Line vs. Tilghman, 237 U. S. 499.)

To the same effect is the decision of this Court in Norfolk, etc., R. Co. vs. Earnest, 229 U. S. 114.

V.

THE COURT ERRED IN INSTRUCTING THE JURY THAT IN A CASE FALLING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT THERE COULD BE A RECOVERY ON ACCOUNT OF THE FAILURE OF THE DEFENDANT TO PROVIDE PROMPT AND PROPER MEDICAL ATTENTION TO AN INJURED EMPLOYEE.

The Federal Employers' Liability Act makes no provision for a recovery due to negligence in furnishing medical or surgical attention to an injured employee. The Act is complete in and of itself and excludes any remedy or relief granted by State laws. This Court in the recent cases of New York Central R. Co. vs. Winfield, 37 Sup. Ct. Rep., 546, and Erie Railroad Co. vs. Winfield, 37 Sup. Ct. Rep. 556, has held that the Federal Employers' Liability Act excluded any recovery except that based on the negligence causing the injury, and, therefore, necessarily excluded the provisions of State statutes granting a recovery in cases not based on negligence. Hence, it must necessarily follow that in the instant case the defendant could only be responsible for the negligence of its employees in the operation of the train by which Mullins was injured, or the negligence of the company in failing to furnish a reasonably safe place to work, or in failing to furnish reasonably safe appliances, etc.

The record in this case fails to show that the Railroad Company was under any contractual or legal duty whatever to furnish medical or surgical attention, but nevertheless, the Court charged that if after the injury the Railroad Company took charge of the injured employee and did not then provide prompt and proper medical attention, the Railroad Company would be liable. This is a totally erroneous instruction and wholly unwarranted by the Federal Employers' Liability Act. It is also erroneous as not stating a correct principle of law even if the case fell outside of the Federal Employers' Liability Act.

The instruction of which we are complaining is as follows:

> "The Court instructs the jury for the Plaintiff: That if you believe from the evidence in this case that the Defendant Railroad Company took charge of the deceased after his injury and brought him to Natchez and later placed him in charge of the Natchez Sanatorium, and that in the performance of these acts the Defendant Company was negligent in failing to provide prompt and proper attention, and that that negligence contributed in whole, or in part, to the death of the deceased, and that up to that time of that negligence the Defendant Company was guilty of no other negligence in this case, then in that event you should find for the plaintiff, but you should not assess any damages for pain and suffering to the deceased prior to the time the defendant company was negligent in attention furnished him after

> the injuries, if any, and providing you further believe that the deceased was not himself guilty of contributory negligence and did not assume the risk." (R. 115.)

Assuming for the sake of argument that the Railroad Company was under some legal duty to furnish medical attention, its full duty in that regard was discharged when it exercised ordinary care in the selection of competent doctors and surgeons and the Railroad Company would not be responsible thereafter for the failure of such physicians to give proper attention, or for the mistakes of such surgeons. In the case of Quinn vs. Railroad, 94 Tenn. 713, in which there was under consideration the obligation of a Railroad Company to furnish medical attention to an injured employee, the Supreme Court of Tennessee said:

> "In accordance with this view, it has been uniformly held, so far as we have been able to discover, that, having selected surgeons, skilled and competent in their profession, the corporation has discharged every duty that humanity or sound morals impose, and that it is to no extent liable for the mistakes they may subsequently commit."

The same conclusion has been reached by the United States Circuit Court of Appeals for the Eighth Circuit in the case of Union Pacific R. Co. vs. Artist, 60 Fed. Rep. 365. In this case there was involved the question of proper medical attention to an injured employee. In that case, Judge Sanborn said:

"It would be a hard rule, indeed,—a rule calculated to repress the charitable instincts of men,—that would compel those who have freely furnished such accommodations and services to pay for the negligence or mistakes of physicians or attendants that they had selected with reasonable care. No such rule has ever prevailed in this country. The rule is that those who furnish hospital accommodations and medical attendance, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own want of ordinary care in selecting them."

(Union Pac. R. Co. vs. Artist, 60 Fed. Rep. 368.)

And again:

"The result is that the doctrine of respondeat superior has no application to this case. The only contract the law implies here is the agreement on the part of the company to use reasonable care to select and obtain skillful physicians and careful attendants, and if the Company performed that contract it was responsible no further."

By the above instruction, the Railroad Company is made absolutely liable if the medical or surgical attention given by the Doctors employed by the Railroad Company was not proper. In other words, the Railroad Company is made responsible for the mistakes or negligence of the surgeons. Indeed, there was an attempt in the evidence

on the part of the plaintiff to show that the surgeon who gave first attention to the deceased was negligent in not stopping the flow of blood. Assuming for the sake of argument that the surgeon was negligent, this did not under the law render the Railroad Company liable. There is no foundation for any contention that there was any negligence on the part of the Railroad Company in retaining the surgeons who were retained; there is no evidence that the Natchez Sanatorium was not a proper place for the care of the deceased. The record shows unusual efforts on the part of the Railroad Company to care for the deceased.

It was 4:05 A. M. when Pole Gibson and his wife, Martha Gibson, left their house to go to the deceased, having been impelled to go there by reason of the groans which they heard. (Rec. 16). The Operator who was in charge of the Harriston office was not advised of the accident until 4:15 or 4:20 A. M. (R. 21.) There was no doctor at Harriston. The nearest doctor was at Fayette. (R. 22.) It is three miles from Harriston to Fayette. (R. 22.) The Operator immediately telephoned one doctor, and upon stating the condition of the patient to that doctor, the doctor said that it was not necessary for him to come. (R. 19.) The Operator then telephoned Dr. Lewis at Fayette and arranged for him to meet the train on which it was intended to carry Mullins to Natchez. (R. 20.) He also immediately took the matter up with the train dispatcher at Wilson, La., who had charge of this division of the Railroad. (R. 20.) The train dispatcher

at once arranged for another freight train then at Harriston to take the injured man to Natchez to the Natchez Sanatorium. (Rec. 106). This special train left Harriston at 4:35 A. M. (R. 21) and arrived at Natchez at 5:30 A. M., (R. 29), a distance of 28 miles, being run in 55 minutes, with a stop of three or four minutes at Fayette, where Dr. Lewis was taken on to give attention en route. This was a record run on that road between Harriston and Natchez. (R. 103.) As stated, the train arrived at Natchez at 5:30 A. M., and the injured party was carried in an ambulance to the Natchez Sanatorium and admitted to the Sanatorium at 5:40 A. M., (Rec. 25), where he was given further medical attention. The Doctor who got on the train testified that there was no hemorrhage and that he administered morphine. (R. 108.) There was evidence tending to show that blood was dripping from the floor of the car, but this is entirely consistent with the statement of the doctor who got on the train at Fayette, as this blood, which was dripping from the car, was evidently blood which had flown before the train reached Fayette. The Doctor who boarded the train at Fayette, as stated, testified that there was no hemorrhage. In attempting to provide for the injured man the Train Dispatcher at Wilson not only used the telegraph, but also the long distance telephone. (R. 106.)

VI.

THE MISSISSIPPI SUPREME COURT ERRED IN REFUSING TO REVERSE THIS CASE ON THE

GROUND THAT NO NEGLIGENCE ON THE PART OF THE DEFENDANT WAS SHOWN WHICH WAS THE CAUSE OF THE INJURY OR WHICH PROXIMATELY CONTRIBUTED TO THE INJURY.

The contention of the plaintiff in this case was that the roadway was unsafe, and the greatest extent of the plaintiff's proof in this regard was that the track was built up above the adjoining ground and that the gravel ballast between the tracks was loose and uneven and rendered it difficult to obtain a firm foot-hold (43, 46, 49). However, as ballast is a necessary incident of all tracks and consists of broken stone or gravel, and as tracks are built above the ground, proof of this kind did not amount to proof of negligence. The defendant's proof was clear and positive that the roadway was in a safe and proper condition and that the plaintiff had worked and switched over this part of the roadway for three years. (R. 64.) The plaintiff also claimed that the ladders, handholds, steps, etc., were defective and unsafe. The only proof with which the plaintiff attempted to sustain this claim was that the rear car on the freight train was a passenger car instead of a caboose and that it was somewhat more difficult to board a passenger car than a caboose. (R. 32.) We submit that this is not proof of negligence. There was no proof that any of the safety appliances were defective in any way. The defendant's proof showed that all appliances were in proper condition and that a passenger car was as easy to board as a caboose. (R. 101, 97.)

There was another claim on the part of the plaintiff that the train moved out of Harriston at a rapid rate of speed, thereby making it more difficult for the train to be boarded. The proof, however, conclusively showed that the train moved out on the signal of the deceased and that he could have had the train move out at a slower speed by giving a "go-ahead" signal instead of a "high-ball" signal. (R. 68.) The defendant's proof further showed that the train moved out slowly and that at the time of passing through the cattle gap, which was beyond the place of the injury to the deceased, it was moving only eight or ten miles an hour. (R. 47, 75.) The proof further showed that it was the duty of the deceased to board the train after giving the signal, and if he did not do so and waited to board the train until the end of the train reached him, and the train was then running too fast, it was the duty of the deceased not to take the risk of boarding the train, but to signal the engineer to stop. (R. 74, 68.)

On the whose case, an examination of the record will show a complete absence of negligence on the part of the Railroad Company.

However, assuming that the plaintiff did show that the defendant's roadway was defective and that the hand-holds and other appliances on its cars were unsafe and that the train was operated at a negligent speed, yet there is absolutely no proof to show that any of these matters was the proximate cause of the injury. In other words,

there is no proof of causal negligence. The only explanation which the deceased gave of his injury was that he missed his hold. As to whether he missed his hold in climbing up a ladder on a car of the train, or as to whether he missed his hold in passing from one car of the train to another car, the record utterly fails to show. The mere fact of the proof of negligence does not establish liability. Negligence must be established **which proximately caused the injury.** As this court said in St. Louis, Iron Mountain & Southern vs. McWhirter, 229 U. S. 280, "It requires no reasoning to demonstrate that the general rule is that, where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage." In the McWhirter case a recovery was sought for an injury by reason of the employee having worked over-time, and this Court held that the mere fact of working over-time in violation of the Federal statute, in order to be the basis of recovery, must be shown to have proximately caused the injury, and that the jury could not be left to conjecture and surmise. Said this Court in that case:

> "Assuming then that, as the result of the hypothesis we have indulged in, the case is reducible to the Federal question last stated, we are clearly of the opinion **that, as there was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed.** Of course, the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere

surmise or conjecture, or by resorting to imaginary possibilities, for to do so would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of."

(St. L. I. M. & S. R. Co. vs. McWhirter, 229 U. S. 280.)

Assuming everything established for which plaintiff contends, it is a mere matter of guess as to whether any of the acts of negligence claimed by the plaintiff had anything whatever to do with the injury. When the evidence leaves a matter in this uncertainty, the plaintiff simply fails to prove his case and must lose. As this Court said in Patton vs. Texas & P. R. Co., 179 U. S. 663:

"And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Indeed, as the deceased was found lying on the track about 450 feet, or 150 yards, north of where he was standing when he gave the signal to start, and when the train

moved (R. 65, 42, 99), the most rational inference which can be drawn is that he boarded the train at the point where he was standing before the train had started, and that he met his death by a mis-step in passing along the top of the train. This would account for his body being found 150 yards north of the point at which he was standing when the train started. There was no proof whatever that he was dragged by the train and there was no proof of any physical evidences on the track or roadway of his body being dragged.

VII.

FILING OF PETITION FOR CERTIORARI PROPER THOUGH A WRIT OF ERROR ALREADY GRANTED.

While this case is already in this Court on a writ of error granted by the Chief Justice of the Mississippi Supreme Court, yet where there is doubt as to whether writ of error or certiorari is the proper method of review, this Court has recognized the propriety of suing out a writ of error and also petitioning for a writ of certiorari.

Farrel vs. O'Brien, 199 U. S. 89, 101, 50 L. ed. 101;

Cochran vs. Montgomery County, 199 U. S. 260, 50 L. ed. 182;

Security Trust Co. vs. Dent, 187 U. S. 237, 47 L. ed. 158;

Montana Min. Co. vs. St. Louis Min. Co., 204 U. S. 213, 51 L. ed., 444;

Whitney vs. Dick, 202 U. S. 132, 50 L. ed. 963.

Gompers vs. U. S., 233 U. S. 604.

On the whole case we submit that the judgment should be reversed and the cause remanded.

Believing that the foregoing errors are so apparent and palpable that a reversal of the case must necessarily be had, other errors which are assigned are not argued here, though the same are not intended to be waived.

Respectfully submitted,
CHARLES N. BURCH,
H. D. MINOR,
Attorneys for Petitioners.

MAYES, WELLS, MAY & SANDERS,
RATCLIFF & KENNEDY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

NO. 683.

The Yazoo & Mississippi Valley Railroad Company, et al.,
Petitioners,

vs.

Clara J. Mullins, Administratrix of the Estate of J. D. Mullins,
Respondent.

In re Petition to the Supreme Court of the United States for Writ of Certiorari:

To. M. W. Reily, Esq.,
Meridian, Mississippi.

Please take notice that on Monday, October 15, 1917, at twelve o'clock, noon, or as soon thereafter as counsel may be heard the foregoing petition and brief will be submitted to the Supreme Court of the United States at its usual place for holding its sessions in the Capitol at Washington, D. C., for its consideration and action.

CHAS. N. BURCH,
Attorney for Petitioners.

Service of a copy of the foregoing petition, brief and notice are hereby acknowledged this 25th day of September, 1917.

M. W. REILY,
Attorney for Mrs. Clara J. Mullins, Administratrix of the estate of James Davis Mullins.

JAMES D. MAH

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Et Al., Petitioners,

vs. No. [redacted]27

CLARA J. MULLINS, Administratrix of the Estate of J. D. Mullins, Respondent

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

CHARLES N. BURCH,
H. D. MINOR,
Attorneys for Petitioners.

MAYES, WELLS, MAY & SANDERS,
RATCLIFF & KENNEDY,
Of Counsel.

E. H. TOOF & CO., MEMPHIS

In the Supreme Court of the United States

OCTOBER TERM, 1917.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Et. Al., Petitioners,

vs. No. 683.

CLARA J. MULLINS, Administratrix of the Estate of J. D. Mullins, Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

May it please the Court:

Since the printing of our brief in support of our petition for certiorari, there has been published the opinion of the Supreme Court of Arkansas, in the case of St. Louis, Iron Mountain & Southern Railway Company v. Steel, 197 S. W. Rep., 288. In a well reasoned opinion, the Supreme Court of Arkansas holds that the statute of Arkansas, creating a prima facie presumption of negligence in case of injury by a train, has no application to a case falling under the Federal Employers' Liability Act, and cannot be availed of in a case falling under said Federal Act. This decision is directly opposite to the holding of the Supreme Court of Mississippi in the instant case, and this conflict of state authorities on a question arising under the Federal Employers' Liability Act is, we submit, an additional reason for granting the writ of certiorari which is prayed for in this cause, par-

ticularly in view of the lack of any federal authority on the exact point.

Respectfully submitted,

CHARLES N. BURCH,

H. D. MINOR,

Attorneys for The Yazoo & Mississippi Valley Railroad Company, Et Al., Petitioners.

MAYES, WELLS, MAY & SANDERS,

RATCLIFF & KENNEDY,

Of Counsel.

I hereby certify that I have this day sent by United States Mail to Meridian, Mississippi, to Hon. M. W. Reily, attorney for Mrs. Clara J. Mullins, Administratrix, respondent in this cause, a copy of this supplemental brief.

This 9th day of October, 1917.

CHAS. N. BURCH,

Attorney for petitioners.

MAR 18 1919
JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 273.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY and E. H. RATCLIFF and L. T. KENNEDY, Its Sureties, Plaintiffs in Error.

vs.

MRS. CLARA J. MULLINS, Administratrix of the Estate of James Davis Mullins, Deceased, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI AND ON PETITION FOR CERTIORARI.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

CHARLES N. BURCH,
H. D. MINOR,
Attorneys for Plaintiffs in Error.

WELLS, MAY & SANDERS,
RATCLIFF & KENNEDY,
Of Counsel.

LAUSCH & ARNOLD - MEMPHIS

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 273.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY and E. H. RATCLIFF and L. T. KENNEDY, ITS SURETIES, PLAINTIFFS IN ERROR.

vs.

MRS. CLARA J. MULLINS, ADMINISTRATRIX OF THE ESTATE OF JAMES DAVIS MULLINS, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI AND ON PETITION FOR CERTIORARI.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

MAY IT PLEASE THE COURT:

This is an action under the Federal Employers' Liability Act to recover damages for personal injuries. In our brief heretofore filed in support of the petition for certiorari in this case, we have set out a statement of the case, presenting the questions involved and the manner in which they are raised, also a specification of the er-

rors relied upon, and a brief of the argument, exhibiting a statement of the points of law and fact, and, without repeating what is said in the brief heretofore filed, we adopt same as the brief on the writ of error and desire now only to call attention to a case decided by this Court since our original brief was filed. This case is New Orleans & Northeastern Railroad Co. v. Harris, 247 U. S. 367, and it is therein definitely decided by this Court that Section 1985 of the Code of Mississippi (presumption of negligence statute), as amended by Chapter 215 of the Laws of 1912 of Mississippi, has no application to cases falling under the Federal Employers' Liability Act, and, on the authority of that case, we submit the instant cause must be reversed. Said Chapter 215 of the Acts of 1912 of Mississippi provides as follows:

> "In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such corporation or such other corporation, company, partnership or individual shall be prima facie evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employes of railroad corporations and of such other corporations, companies, partnerships and individuals."

For convenience, we summarize in brief form the points relied upon for the reversal of the judgment in this cause (all of said points being fully briefed and discussed in our original brief):

1. The Supreme Court of Mississippi erred in applying the above statute as a basis for sustaining the judgment in this cause. (Record 143).

New Orleans & N. E. R. C. v. Harris, 247 U. S. 367. U. S. 367.

2. Error in the instruction for the plaintiff "that it was the absolute duty of the defendant to furnish the deceased with a safe place to perform the duties incident to his employment." (Record 113). The correct rule is that the employer's duty is to exercise ordinary care to furnish a reasonably safe place for work and reasonably safe cars and appliances.

Chicago & N. W. R. Co. v. Bower, 241 U. S. 479;

Seaboard Air Line v. Horton, 233 U. S. 492;

Choctaw, O. & G. Ro. Co. v. Tenn., 191 U. S. 326.

3. Error in the instruction for the plaintiff as to contributory negligence, in that the Court directed that, in the event of contributory negligence, "the jury should diminish the amount of damage shown by the evidence to have been sustained, if any, in proportion to the amount of negligence *attributable to the defendant*, if any" (Record 114). The diminution should have been in proportion to the amount of negligence attributable *to the plaintiff and not to the defendant*.

Seaboard Air Line v. Tilghman, 237 U. S. 499;

Norfolk & W. R. Co. v. Earnest, 229 U. S. 114.

4. Error in instructing the jury for the plaintiff that the plaintiff could recover if the defendant took charge of the deceased after his injury "and that in the performance of these acts the defendant company was negligent in failing to provide prompt and proper attention" (Record 115). There is no recovery under the Fed-

eral Employers' Liability Act for failing to provide medical attention and no recovery under the common law for mistakes made by competent surgeons and doctors.

Union Pacific R. Co. v. Artist, 60 Fed. Rep. 365;
Quinn v. Railroad, 94 Tenn. 713.

5. Error in that the directed verdict requested by the defendant should have been granted (Record 117). There was no evidence of negligence of the defendant which proximately caused or contributed to the injury and, in the absence of such negligence, the jury should not be left to surmise or conjecture.

St. L. I. M. & S. R. Co. v. McWhirter, 229 U. S. 280;
Patton v. Texas & P. R. Co., 179 U. S. 663.

As this Court will undoubtedly follow its opinion in New Orleans & Northwestern R. Co. v. Harris, 247 U. S. 367, and will hold that the presumption of negligence statute of Mississippi has no application, it is unnecessary to discuss the specification of error set out in the original brief to the effect that in the event the presumption of negligence statute is applicable, then such statute was construed by the Supreme Court of Mississippi in a manner to deprive the defendant of due process of law in violation of the Fourteenth Amendment and is therefore unconstitutional. It was this assignment of error which was the proper basis for the writ of error in this case but the same is not now material, as this Court has held in the case just cited that the presumption of negligence statute of Mississippi should not be applied at all.

All the above propositions are fully discussed in the original brief and the points are merely stated here for convenience and without elaboration.

Respectfully submitted,

CHARLES N. BURCH,

H. D. MINOR,

Attorneys for Plaintiffs in Error.

WELLS, MAY & SANDERS,

RATCLIFF & KENNEDY,

Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 683.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET ALS., Petitioners,

vs.

CLARA J. MULLINS, Administratrix of the Estate of J. D. Mullins.

STATEMENT OF CASE AND BRIEF FOR DEFENDANT IN ERROR.

James Davis Mullins was employed as flagman upon a train of the Y. & M. V. Railroad Company. It was his duty to assist in switching the cars, and to signal the engineer when the train was ready to start from stations. (R. 34-35-64.)

On October 14th, 1915, while discharging his duties at Harrison, Mississippi, during the night time, he was injured by having his arm crushed by the train. Harrison is a place at which a great deal of switching is done, all of the trains from Natchez, Jackson, Vicksburg and New Orleans, being handled there. (R. 34-40.)

Although the switching yards were used night and day for switching they were in total darkness —there being no light in them. (R. 76.)

The night on which he was injured was very dark. It was necessary for certain switching to be done, and when this was completed, Mullins and the Brakeman signaled the train to start forward. The train was drawn by two engines. From the point at which the train started forward for a distance of half mile there was a down grade. (R. 66.) The flagman generally mounts the caboose not the cars. (R. 32.) A passenger coach was being used for a caboose and was more difficult to mount than a standard caboose. (R. 32.) Three witnesses testified that the place at which Mullins attempted to mount the train, was rough and uneven, the cross-ties extending quite a distance and above the ground, the ground having washes in it, the gravel being loose and uneven and of such character that it would slip under the feet of any one walking upon it, and the ground by the side of the track being much lower than the rail. (R. 39-43-46-47-49-50-51.) The witnesses for the Company testified that the yard was in perfect condition. One witness testified that she had lived near the track for many years and could tell from the sound of a running train how fast it was running, and that the train was running fast when it passed the spot at which Mullins was killed. The train was composed of thirty-four cars, two tenders, two engines, and one caboose. (R. 66.) The cars were about thirty-eight feet long each, the

tenders about twenty feet long each, the engines about fifty feet long each and the caboose about forty feet long. (R. 67.) It is common knowledge that there is a distance of about three feet between the cars, tenders and engine. If this distance be considered the train was about fifteen hundred and ninety feet in length. When Mullins was last seen he was about five or six cars from the engine and was therefore a distance from the caboose equal to the length of the train less five or six car lengths, or about thirteen hundred and fifty feet. (R. 63.) The caboose traveled that distance before it reached him. He was either dragged some distance by the train or else ran along by it trying to mount it because he was found thirty feet south of the cattle gap. He stated, "I missed my hold." The engineers testified that the train was traveling eight or ten miles when it passed the cattle gap, but when cross-examined they in substance said that the train was started as trains generally were and that because of their experience in handling trains they could testify as to the increase in the speed of trains when traveling on a level track and when started in the usual way. (R. 66.) One of them testified that when a train of the length of the train which killed Mullins started upon level track and had traveled two blocks it would be going fifteen miles per hour. (R. 66.) The other testified that when such a train on level track had traveled five or six hundred feet it would be going full speed and full speed for that train was twenty-five miles per hour. (R. 77.) Therefore there was evidence which warranted the

jury in believing that the train was traveling twenty-five miles per hour when the caboose reached Mullins, because the caboose traveled down grade with two engines pulling it OVER THIRTEEN HUNDRED FEET BEFORE IT REACHED MULLINS. It was the duty of the engineer to start the train so that the entire crew could mount it, and to know that the entire crew was on the train. (R.33-66-69.) The engineer, Gilmore, who was pulling the train, made no effort to meet this duty and only looked back when he was twenty-five or thirty car lengths North of the cattle gap (a distance of over fifteen hundred feet) from where Mullins was last seen, for the purpose of seeing if the tail lights on the train were burning. (R. 76.) The engineer, Durkee, made no effort to discharge any duty to Mullins who was required to mount the moving train. (R. 68.) The record does not show the condition of all the cars because one of the cars was set out at Port Gibson and cars were taken from the train and others added to it at the various stations before it reached Vicksburg.

Mullins at one time worked about the yards at Harrison but for more than a year previous to the injury had worked elsewhere and therefore did not know the condition of the yard at Harrison. (R.111-112). He was discovered at 4:15 a. m. and the Railroad Company was at once notified. An idle train was at Harrison and although Mullins was bleeding to death that train did not start for Natchez with Mullins until 4:35 a. m. (R. 21.) When Dr.

Harrison, the Railroad Company's physician, was notified of Mullins' injury and condition he refused to come, and finally word was left with the telephone operator to notify Dr. Lewis. (R. 19.) No physician was with Mullins until the train reached Fayette, where Dr. Lewis mounted the train. (R. 108.) Dr. Lewis graduated in 1889 in medicine but had retired from the general practice of medicine and was engaged in planting and road contracting business. (R. 19-20-109.) He devotes his time to his business, not to medicine. No effort was made from Harrison to notify the Sanitarium at Natchez to meet Mullins at the train and as a consequence Mullins remained at the station at Natchez for a long time before the ambulance came. (R. 20 - 23.) One witness stated that he waited there thirty-five or forty minutes before Dr. Sessions came to him. (R. 36.) Dr. Lewis made no effort to stop the flow of blood. (R. 108-109.) Something should have been done by Dr. Lewis to stop the flow of blood. (R. 29-27-24.) When Mullins reached Natchez he had bled so that the blood soaked through the floor of the car and the cushion that had been placed under him and was dripping upon the ground. (R. 35-36-37.) Mullins died of shock and loss of blood. (R. 25.) If Mullins had not lost so much blood his chances of recovery would have been better. (R. 23.) Mullins was conscious and suffered greatly. His mother was entirely dependent upon him. (R. 58.)

PLEADINGS.

The declaration contains three counts: Two under the State law and one under the Federal Employer's Liability Act.

The grounds alleged for recovery were:

First: Failure to furnish a reasonably safe place to work;

Second: Failure to properly equip cars;

Third: Failure to start train with reasonable care so that decedent could mount same in discharge of his duties;

Fourth: Failure to furnish decedent with proper medical attention and surgical aid.

ARGUMENT.

It was proper procedure for the trial Court to hear all of the evidence and then instruct the jury as to what law governed the case.

Ex Parte Atlantic Coast Line, 67 Sou. 256.

Thomp. Fed. Emp. Liability Act. Page 305.

Conflicting testimony will not be considered by this Court. Unless the testimony was such that no recovery could be had upon the facts shown in any view which can be properly taken, then this Court will not disturb the finding of the jury.

Myers vs. Pitts. Coal Co. 233 U. S. 184, 58 Law Ed. 906.

Trowell vs. Delaware L. etc. R. R. Co. 227 U. S. 434, 57 Law Ed. 586.

Was there evidence of negligence by the Railroad Company?

When decedent was injured he was working in the switch-yards of the Company at Harrison. A great deal of switching is done at Harrison. Trains from Natchez, New Orleans, Vicksburg and Jackson are made up at that place. Switching was done both night and day. It was the duty of the Company to have the yards in such condition that its employees could mount a running train in safety at all times. The yard was in such condition that the man who attempted to mount a fast moving train in night time took his life in his hands. Three witnesses testified that the place at which Mullins attempted to mount the train was so rough and uneven that it was very difficult to even walk upon it. There were great washes and ditches in the ground, the gravel and rocks were so loose and uneven that one could hardly walk on it. The cross-ties protruded a great distance from the rails and stood high in the air. The rails were more than a foot above where one who mounted the train would have to stand to do so. Naturally, any one running by a fast moving train to mount it would stumble and miss his hold and fall. There was no standard caboose, which has a long iron hand-hold upon it so that it can be easily caught, used upon the train, but a passenger coach, which is more difficult to mount than a standard caboose, was used. The night was

very dark and the switch yards not lighted. Both of the engineers knew how fast a train increased in speed from the start, and one testified that when the train had traveled two blocks it would be traveling about fifteen miles per hour, and the other testified that when it had traveled five or six hundred feet it would be going its full speed, which was twenty-five miles per hour. The caboose and cars near it had traveled over twelve hundred feet when they reached Mullins, and in view of the fact that they were being drawn by two engines and were going down grade, they were surely traveling at least twenty or twenty-five miles per hour. The jury was warranted in reaching this conclusion. It is common knowledge that for a man to mount a moving train he must run along by it, and if Mullins did this he was forced to travel over the rough and dangerous places about which the witnesses for the Defendant in Error testified.

Mullins said, "I missed my hold." What hold? His duty required him to mount the train and to do this he must take "hold" of it. He was standing waiting evidently for the caboose when last seen. He missed his hold, when, while running along by the train in the darkness over the rough, uneven yard, where the loose rocks slipped beneath his feet and the extended cross-ties tripped him, he tried to catch the flying train that he might keep his job and further serve his Master.

That conviction is unescapable. The finding of the jury established the negligence of the Company

upon every point that there was evidence to justify the inference of negligence. The verdict did more: It established the fact that such negligence was responsible for the injuries. The engineers admitted that it was their duty to start the train leisurely so that the entire crew could mount it and to see that all were aboard. They further admitted that they made no effort to see who was aboard. One engineer after he was going full speed and was sixteen hundred feet from where Mullins was last seen looked back to see if his tail light was burning — the other never looked back at all.

Was not the testimony of the engineers as to the increase in the speed of the train more reliable than their statements as to their recollection of how fast they were traveling when they passed the cattle gap? There was nothing to cause them to note how fast they were traveling at that time. They knew nothing of the injury until they had reached Port Gibson. But they could, in view of their years of experience in driving engines, say with certainty just what was the approximate increase in the speed of a train from the time it started.

Opposing counsel cite the case of New Orleans and North Eastern R. Co. vs. Harris, 247 U. S. 367. In that case the jury was instructed under prima facie statute, being Section 1985 of the code of Mississippi, and were told that the mere fact that Harris was injured by a running train was presumptive evidence of negligence.

In the case at bar no such instruction was given,

but the following instructions were given for the Railroad Company:

> "The Court instructs the jury for the Defendant that this case comes under the Federal Employers Liability Act and no presumption of negligence can be indulged in against the Defendant by reason of any proof of injury by the running of the train, but under this act negligence of the Defendant must be affirmatively proven by evidence before the jury to the satisfaction of the jury and must be shown and established by a preponderance of the evidence." (R. 116.)

> "The Court instructs the jury for the Defendant that under the Federal Employers Liability Act, the Plaintiff can not recover unless the evidence shows that the decedent's injuries was caused by the negligence of the officers, agents or employees of the Defendant or by reason of some defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road bed, ways or works." (R. 116.)

> "The Court instructs the jury for the Defendant that the burden of proof is on the Plaintiff to show by a preponderance of the testimony that Mullins was injured on account of the negligence of some officer, agent or employee of the Defendant or on account of a defect due to negligence in its cars, engines, appliances, machinery, track, road beds, ways or works, and if she has failed in this she can not recover." (R. 116.)

> "The Court instructs the jury for the Defendant that the burden of proof is on the Plain-

> tiff to establish to the satisfaction of the jury by a preponderance of the evidence every material allegation of the declaration and which is necessary to her recovery and failure to establish any material and necessary allegation entitles the Defendant to a verdict at your hands and you should find for the Defendant." (R. 117.)

It is true that the Supreme Court of Mississippi held that the Prima Facie statute applied and that the Defendant in error was entitled to a directed verdict. However, this Court is not controlled by the conclusion of the State Court, but will decide this case in the light of the testimony and the instruction given and refused.

The State Court did not hold that the Defendant in error had not proven facts which would warrant a verdict, but rather indicated that the opposite was true, irrespective of the Mississippi statute. The State Court employed the following language:

> "The Plaintiff at the trial below proved the injury to deceased was inflicted by the running of the cars of Appellant Railroad and also introduced testimony to prove by circumstances, physical conditions and inferences, the allegations of the declaration as to the defective and unsafe ways and appliances and the dangerous speed of the train."

That Court simply held that it was unnecessary for it to decide any question other than that there

was proof that decedent had lost his life because of the running of the cars of the Plaintiff in error and that Plaintiff in error had not explained the facts of the killing and therefore under the Mississippi Statute the Defendant in error was entitled to a peremptory instruction even though the Defendant in error had not asked for it. The Harris case in no way touches the case at bar.

Complaint is made that the trial Court instructed the jury as follows:

> "That it was the absolute duty of the Defendant to furnish the deceased with a safe place to perform the duties incident to his employment and with safe cars and appliances, etc."

Of course the Plaintiff in error met its duty if it made a reasonable effort to furnish a safe place and safe appliances. The instruction given was intended to so inform the jury. It does not tell the jury that the Plaintiff in error was required to furnish an absolutely safe place. It was the absolute duty of the Plaintiff in error to furnish a reasonably safe place and appliances. Counsel cite the following cases to sustain their contention:

Chicago & N. W. R. Co. vs. Bower, 241 U. S. 470.

Seaboard Airline vs. Horton, 233 U. S. 492.

Choctaw O. & G. Co. vs. Tennessee, 191 U. S. 326.

These cases simply hold that "the employer is under a duty to exercise ordinary care to supply ma-

chinery and appliances reasonably safe and suitable for the use of the employee, but is not required to furnish the latest, best and safest appliances or to discard standard appliances upon the discovery of the later improvements, provided those in use are reasonably safe and suitable." The first case cited does not apply because in that case no instruction similar to the instruction given in the case at bar was involved. The Horton case does not apply because that case was reversed because the jury were improperly instructed touching the question of assumption of risk, and that was the vital question in the case. The trial Court in that case refused an instruction properly announcing the law. The special finding of fact showed conclusively that the jury had been misled by the erroneous instruction.

The Tennessee case cited above does not benefit the Plaintiff in error. In that case this Court held that even though the trial Court improperly announced the obligation of the master to furnish a safe place to work, yet this would not require a reversal of the case because the jury was properly instructed upon this point in other instructions. Another reason why the instruction in hand will not reverse this case is because there was no dispute as to what effort the Railroad Company made to have its switch yard in proper condition. The yard was in the same shape it had been in for years. It was not contended that any effort had been made to repair it. Indeed, the evidence for the Railroad Company showed that they deemed the yard in splendid shape. Therefore the instruction could not have mis-

led the jury, and unless it can be affirmatively said that the jury was probably misled by the instruction the case will not be reversed because of it. THE CASE DID NOT TURN UPON WHAT EFFORTS THE RAILROAD COMPANY HAD MADE TO PUT THE SWITCH YARD IN REPAIR. See the following cases:

Tex. & Pacific R. Co. vs. Bigger, 239 U. S. 330, 60 Law Ed. 310.

Chicago R. I. & P. R. Co. vs. Wright, 239 U. S. 548, 60 Law Ed. 431.

Phoenix R. Co. vs. Landis, 231 U. S. 578, 58 Law Ed. 337.

The Railroad Company made no effort to have the Court properly instruct the jury upon this point and can not complain.

St. Louis & S. F. R. Co. vs. Brown, 241 U. S. 223, Law Ed. 966.

Ill. C. R. R. Co. vs. Skaggs, 240 U. S. 66, 60 Law Ed. 528.

The jury, however, was properly instructed as to the duty which the Railroad Company owed to Mullins. The instructions hereinbefore quoted and which appear upon pages 116 and 117 of the record, tell the jury, that the case was governed by the Employers Liability Act and that the Defendant in error could not recover unless she had proven by a preponderance of the evidence and to the satisfaction of the jury that Mullins lost his life because of the negligence of the officers, agents, or employees

of the Plaintiff in error or because of some defect in the ways, means, appliances, road bed, track or places of work of the Railroad Company which were due to the negligence of the Railroad Company. Surely the law required that Defendant in error make no stronger proof than was required under these instructions. I call attention to another instruction given the Railroad Company, which reads as follows:

> "The Court instructs the jury for the Defendant that if they believe from the evidence that Mullins was employed as flagman by the Defendant Company, then he assumed all risk of employment, except those caused by a violation of the Federal Statutes enacted for safety of employes, and before his representative can recover she must show that the defect or violation of the Federal Statutes contributed to the injury." (R. 117.)

If the jury was properly instructed at the instance of the Railroad as to the duty of the Railroad to furnish a safe place to decedent then the case will not be reversed even though the instruction in hand be faulty:

Choctaw O. & G. R. Co. vs. Tenn. 191 U. S. 326, 48 Law Ed. 201.

Sou. R. Co. vs. Bennett, 233, U. S. 80, — Law Ed. 860.

Penn. R. Co. vs. Olivent Bros., 243 U. S. 574, 61 Law Ed. 98.

Opposing counsel complain that the trial Court instructed the jury that "the jury should diminish the amount of damages shown by the evidence to have been sustained, if any, in proportion to the amount of negligence attributable to the Defendant, if any." (R. 114.) This Court has held that equally faulty instructions would not necessitate a reversal where the complaining party sat idly by and failed to ask for proper instructions upon the point involved, as did the Railroad Company in the case at bar.

St. Louis & S. F. R. Co. vs. Brown, 241 U. S. 223, 60 Law Ed. 966.

Ill. C. R. Co. vs. Skaggs, 240 U. S. 66, 60 Law Ed. 528.

But consider this instruction: It does not tell the jury to reduce the damages in the proportion that the negligence of the Defendant was to the negligence of the Plaintiff; nor in the proportion that the negligence of the Defendant was to the combined negligence of the Plaintiff and the Defendant. It simply tells the jury that if the Railroad Company and the decedent were both guilty of such negligence as contributed to the injury of the decedent then the damages should be diminished in the proportion to the negligence of the Railroad Company, if any. The term, "In proportion," is a comparative term. Putting any construction that you may upon the instruction it was too favorable to the Railroad Company, because all of the evidence shows that the Railroad Company was guilty of the grossest negligence, and the verdict of the jury establishes the fact,

while there is absolutely no proof of negligence on the part of the decedent. The instruction gave the jury no intelligent rule to guide them, it is true, but can the Railroad now complain when it sat idly by and failed to ask an instruction setting forth the proper rule? Can it be affirmatively said that the instruction probably caused the jury to find a larger verdict for the Defendant in error than the jury would have otherwise found? If not, the case should not be reversed because of it.

Complaint is made of the instruction, "That if the Railroad took charge of the decedent after the injury and carried him to a sanitarium and that in doing this the Railroad Company was negligent in failing to provide prompt attention to the decedent then the jury should find for the Defendant in error, but should not assess damages for any suffering of the decedent sustained previous to the time that the Railroad Company took charge of him, providing the decedent was not himself guilty of contributory negligence and did not assume the risk.

Counsel contend that in a case governed by the Federal Employers Liability Act there could be no recovery on account of the master's failing to provide prompt and proper medical attention to an injured employee. The Federal Act covers all cases of alleged negligence of an interstate employee, in all cases in which the employer has neglected to do those things which under the common law the master was required to do for the servant. In a case reported in 101 Atl. (Md.) 587, the following announcement appears:

> "Nowhere in the act (Fed. Emp. Act), is any definition of negligence to be found. Therefore the term must be taken to mean such act of commission or omission as would at common law be sufficient to entitle the case to be submitted to the jury."

This Court has frequently announced that the act covered the entire field of liability of an interstate employer to an interstate employee, because of negligence. At the common law the master was required to furnish the servant with required medical and surgical aid when the servant was injured while at work, but this duty was performed when the master furnished a person of ordinary skill and competency. Therefore in the case at bar the Railroad Company was required to furnish the decedent with reasonable promptness with a physician and surgeon of ordinary skill and competency. The Railroad Company met that duty in the following manner: When the decedent was discovered with his arm cut practically off, the Railroad physician, Dr. Harrison, was called and refused to respond. If he had responded and been a person of ordinary skill and competency, then the Railroad Company would have performed its full duty, regardless of how reckless or careless the physician may have been in his treatment of the decedent. However, the doctor of the Railroad Company refused to attend Mullins even after being notified of his condition. After some delay, Dr. Lewis, a man who had abandoned the general practice of medicine and who was a planter and road contractor, mounted the train after

it had started for Natchez. Dr. Sessions, who operated upon the decedent, testified that something should have been done as soon as possible to stop the flow of blood. Dr. Lewis made no effort to stop the flow of blood. Mullins died from loss of blood and shock. If Dr. Lewis had tied up the arteries or even bandaged the arm Mullins would be living today. Did the Railroad Company meet its duty when it furnished a man who was not a regular practicing physician and who was a planter and road contractor and who was not possessed of ordinary skill and competency? The instruction complained of is peculiarly worded, but is more favorable to the Railroad Company than the law authorized. The instruction simply told the jury that if the Railroad Company in taking charge of Mullins and handling him in the manner in which he was handled, failed in their duty to furnish him with proper medical attention then the Railroad Company was liable providing the decedent was not guilty of contributory negligence and did not assume the risk. No strained construction will warrant the idea that the instruction told the jury that the Railroad Company was liable for the mistakes or negligence of the physician, even though the Railroad Company had used reasonable care in selecting the physician. Surely, the evidence warranted the jury in passing on the question of whether or not the Railroad Company had furnished a person of ordinary competency and skill, with reasonable promptness. If the Railroad Company undertook to furnish medical aid did not the law require them to use ordinary care? I do

not contend that the Natchez Sanitarium was not a proper place for decedent. I do contend that the Railroad Company did not furnish, with reasonable promptness, a person of ordinary skill and competency. The decedent bled so profusely that when he reached Natchez he was too weak to stand the operation. No effort was made by the Railroad Company to notify the Sanitarium at Natchez that Mullins was en route there until after he reached Natchez, so that he lay bleeding at the station for thirty-five or forty minutes according to one witness. He was bleeding so that the blood soaked through the cushions under him and through the car and was dripping upon the ground. Common sense tells us that it was necessary to tightly bandage the arm of Mullins to stop the flow of blood. Absolutely no effort was made by Dr. Lewis even after the train reached Natchez to stop the flow of blood.

Why did not the Railroad Company ask the Court for an instruction telling the jury that if it had furnished with reasonable promptitude a man of reasonable skill and competency that the Railroad Company had discharged its full duty? Surely, the Court would have given the instruction.

I submit in conclusion that the Railroad Company was refused no instruction about which it now complains. If there were errors in the instructions given by the trial Court then the Railroad Company sat uncomplainingly by and withheld from the Court its knowledge of those errors.

Only after the jury have spoken do they com-

plain. If the Railroad Company had asked and been refused instructions properly announcing the law upon the points touching which they now complain its position would now be materially different. However, the jury were told in many instructions that unless the Defendant in error had proven by a preponderance of the testimony that the decedent lost his life because of the negligence of the Railroad Company that the verdict should be for the Railroad Company. If the Railroad Company failed to have the jury informed as to what was such negligence as would fix liability upon it, then it can not now complain, and take advantage of its own neglect.

For the above reasons I submit the case should be affirmed.

I understand that under the practice of this Court it is not necessary for me to answer any points not urged in the brief of opposing counsel, and therefore I have discussed only those matters urged in the brief of opposing counsel.

Respectfully submitted,

THOMAS G. FEWELL,
For Defendant in Error.

Copy of foregoing brief is acknowledged by us this 17th day of March, 1919.

CHARLES N. BURCH,
Attorney for Plaintiff in Error.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. *v.* MULLINS, ADMINISTRATRIX OF MULLINS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 273. Argued March 21, 1919.—Decided April 21, 1919.

A state law relieving the plaintiff of the burden of proving negligence is constitutionally inapplicable to a case under the Federal Employers' Liability Act. P. 532. *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367.

For the purpose of determining whether error was prejudicial, this court will examine the whole record, leaving state questions to the decision of state courts in cases coming from them. P. 533.

A flagman was injured while engaged in switching an interstate train. *Held*, that the railroad company was not under an absolute duty to furnish him a safe place for the performance of his duties, but was merely bound to use reasonable care. *Id.*

115 Mississippi, 343, reversed.

THE case is stated in the opinion.

Mr. Charles N. Burch, with whom *Mr. H. D. Minor* was on the briefs, for plaintiffs in error.

Mr. Marion W. Reily, with whom *Mr. Thomas G. Fewell* was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Mullins, a flagman on the Yazoo & Mississippi Valley Railroad, was injured while engaged in switching an interstate train. He died within a few hours; and his administratrix brought suit in a state court of Mississippi

under the Federal Employers' Liability Act. At the trial the Railroad requested a directed verdict on the ground that there was no evidence of negligence on its part. This request was refused; the case was submitted to the jury under instructions, some of which were objected to; and the verdict was for the plaintiff. Upon appeal from the judgment entered thereon the Supreme Court of Mississippi refused to consider the question of sufficiency of the evidence of negligence; and affirmed the judgment on the ground that the so-called "Prima Facie Act" of Mississippi (§ 1985 of the Code of 1906, as amended by c. 215, Laws 1912, p. 290), as to which the trial court had given no instruction, applied and relieved the plaintiff of the burden of establishing negligence. 115 Mississippi, 343. The case comes here by writ of error under § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726.

Since the decision below, this court has decided that the Mississippi "Prima Facie Act" cannot be applied to suits under the Federal Employers' Liability Act, *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367; and the Supreme Court of Mississippi now recognizes this rule. *New Orleans & Northeastern R. R. Co.* v. *Hanna*, 78 So. Rep. 953. The administratrix contends that, as the trial court did not give any instruction concerning the "Prima Facie Act," the error of the Supreme Court in resting its decision on that statute should not prevent an affirmance of the judgment below, because the Railroad was not prejuduced by the error.

It is true generally in cases coming from lower federal courts that the rendering of an erroneous decision on a particular question, *Fidelity & Deposit Co.* v. *Courtney*, 186 U. S. 342, 351; *West* v. *Camden*, 135 U. S. 507, 521; or the assignment by the lower court of an erroneous reason for a right decision; *Seaboard Air Line Ry.* v. *Moore*, 228 U. S. 433, 435; *United States* v. *One Distillery*,

174 U. S. 149, 151; will not entitle the complaining party to reversal, if it is clear that his rights were not prejudiced thereby. And this is likewise true of cases coming from state courts. *Chicago, Rock Island & Pacific Ry. Co.* v. *Wright*, 239 U. S. 548, 551; *New York, Philadelphia & Norfolk R. R. Co.* v. *Peninsula Exchange*, 240 U. S. 34, 41–42. See *Murdock* v. *City of Memphis*, 20 Wall. 590. Whether the case comes from a state court or a federal court, this court will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record; state questions being left to the decision of the state court in cases coming here from those courts.

But we cannot say here that the rights of the Railroad were not prejudiced by the error of the Supreme Court of Mississippi. It may be, as contended by the administratrix, that there was sufficient evidence of negligence to go to the jury, and that the general instructions concerning negligence were proper. But the trial court also instructed the jury that "It was the absolute duty of the defendant to furnish the deceased with a safe place to perform the duties incident to his employment." It is clear that, under the circumstances of this case, the duty was not an absolute one; there was merely a duty to use reasonable care. *Chicago & Northwestern Ry. Co.* v. *Bower*, 241 U. S. 470; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492; *Choctaw, Oklahoma & Gulf R. R. Co.* v. *Tennessee*, 191 U. S. 326, 331. As examination of this record does not convince us that the admitted error was harmless, the judgment of the Supreme Court of Mississippi is reversed. The questions presented being properly here on writ of error, the petition for a writ of certiorari is denied.

Reversed.